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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 4

PETER VAN DER WEYDE, PETITIONER,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1935.

CERTIORARI GRANTED NOVEMBER 18, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 720

PETER VAN DER WEYDE, PETITIONER,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

DOCKET ENTRIES

Apr. 18, 1931.—Libel filed and Monition issued.
Apr. 20, 1931.—U. S. Marshal's return on Monition filed.
Apr. 25, 1931.—Claim of Ocean Transport Co., Ltd., filed.
Apr. 25, 31.—Release bond filed and Notice of Bonding issued.
Dec. 12, 1932.—Intervention by Norwegian Consul and his Exceptive Allegations filed.
Dec. 23, 1923.—Hearing on exceptive allegations of Intervenor had and the Court sustains the Intervenor, and declines to entertain jurisdiction.
Jan. 28, 1933.—Order of Dismissal signed and allowing costs to Claimant and Intervenor.
Feb. 7, 1933.—Cost bill of Claimant and Intervenor (amount $342.05) filed.
Apr. 11, 1933.—Order Court allowing costs as filed.
Apr. 21, 1933.—Libelant files notice of appeal and assignment of errors.
Apr. 29, 1933.—Libelant files motion to prosecute appeal without filing bond. Hearing had and matter taken under advisement.

[fol. 3] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

PETER VAN DER WEYDE, Libelant,

vs.

THE STEAMSHIP "TAIGEN MARU", Her Tackle, Apparel, Engines, Boilers and Furniture, Respondent

LIBEL IN REM—Filed April 18, 1931

To the Honorable Edward E. Cushman, Judge of the District Court of the United States for the Western District of Washington, Northern Division, in Admiralty Sitting:

The libel and complaint of Peter Van Der Weyde, an ordinary seaman, of Portland, Oregon, against the Steamship Taigen Maru, her tackle, apparel, engines, boilers and furniture, in a cause of tort and damages for personal injuries, civil and martime, alleges as follows:

Article I. That during all the times herein mentioned the Steamship "Taigen Maru" was formerly the "Luise Nielsen", and was and is an ocean-going vessel engaged in commerce and the transportation of freight between the Ports of Portland and the Columbia River and the Orient; and on or about the 16th day of May, 1922, said steamship was on the high seas in pursuance of a voyage transporting freight and ballast on a return voyage from the Orient to the Port of Portland, and was about six days out from Astoria, Oregon.

[fol. 4] Article II. That on or about the 17th day of March, 1922, in the city of Portland, Oregon, libelant was employed by the first mate of said steamship as an ordinary seaman on said steamship, for a voyage between the Port of Astoria, Oregon, and the Orient, and return, and in pursuance of said employment, libelant went aboard said steamship and entered upon the performance of his duties as such ordinary seaman.

Article III. That during the course of said return voyage of said vessel, libelant and certain other members of the crew of said vessel were directed to work at chipping off rust from the between-decks on the after part of said vessel; that during the times libelant went to work scraping and chipping rush from the aforesaid deck, he entered the between-decks through the main hatch; that the covers on the between-deck hatches were on, except the hatch on the main deck of said vessel, which had been left open for the purpose of giving light while libelant was so engaged in his work; that said between-decks is dark when the hatch covers on the maindeck are on, unless artificial light is used; that the hatch covers on the between-deck hatch going into the lower hold had been on, as is customary while vessels are at sea; that libelant worked for several days at said work under the direction of the third mate of said vessel, who also acted as boatswain on said vessel; that the food and rations furnished the sailors on said vessel were of an inferior quality, and libelant was sick and ill

on the 16th day of May, 1922, and had been sick and ill for several days prior thereto, and was not able to work in the between-decks aft, and had been at work cleaning up the mess room and quarters.

Article IV. That on the night of the 15th day of May, 1922, the first mate of said vessel informed libelant that he was well enough to go to work chipping off the rust for- [fol. 5] ward with other members of the crew, and on the morning of the 16th day of May, 1922, the third mate in the mess room gave libelant certain tools to work with and directed libelant to accompany him, along with other members of the crew, where he would place libelant to work chipping off rust; that said mate did not inform libelant where he was going to work, but took libelant forward on said vessel, the sailors' mess room being aft in the poop deck of said vessel; that said third mate thereupon descended hatch number two; that one or two of the hatch coverings on said hatch were off; that said between-decks and the hatch thereof were full of coal and the said mate and libelant crawled down said coal until they reached the between-decks, said mate leading the way and libellant following; that when libelant arrived at the between-decks he proceeded to walk aft, and as libelant was walking he walked into the hatch, and fell for a distance of approximately twenty feet into the lower hold.

Article V. That libelant did not know that said hatch was open, and if the hatch covers had been removed and said hatch left open, the same should have been guarded with lifelines; that it is not customary, while vessels are at sea, for the hatch covers to be off of a hatch, and in event hatch covers are removed for any cause, said opening is guarded by a life line being placed around the same, and a light is placed in a position so that it can be seen that said hatch is open, and the crew, when directed to go into the between-decks, are informed that the hatch is open, because there is great danger that in event the hatch is left open, a person will walk into the same while walking in the between-decks.

Article VI. That there were no lights in said between-decks and the same was so dark that libelant could not see where he was walking, and it was negligent and careless [fol. 6] not to provide lights with which to see, and to warn

and advise libelant that said hatch had been left open; likewise, it was negligent and careless to leave said hatch open without a life line around the same and a light over the same, and by reason of said negligence, libelant fell through said hatch, thereby causing an impacted fracture of the head of the right femur, and a fracture of the middle third of the right femur, and injuries to libelant's head and body, thereby permanently crippling and maiming libelant, all to libelant's damage in the sum of Ten Thousand ($10,000.00).

Article VII. That libelant's address is 235 E. 55th Street, Portland, Oregon.

Article VIII. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

For the second cause of suit, libelant propounds as follows:

Article I. Libelant reiterates all of the allegations contained in Articles I to VIII, inclusive, except the averment regarding damages contained in Article VI, as if the same were impleaded therein.

Article II. That by reason of the premises libelant was disabled from performing any work or labor for a long period of time, and the reasonable value of the wages and maintenance which libelant would be entitled to be paid by reason of the premises is in the sum of Three Thousand Five Hundred Dollars ($3,500.00).

Wherefore, libelant prays that process of attachment in due form of law, according to the due course of this Honor-[fol. 7] able Court, in causes of maritime jurisdiction, may issue against the Steamship "Taigen Maru", her tackle, apparel, engines, boilers and furniture, and that her master and all other persons having, or pretending to have, any right, title or interest therein may be cited to appear and answer all matters herein set forth, and that a monition may issue directed to said steamship, directing said respondent to answer the allegations propounded in this libel and complaint, and that this Honorable Court will be pleased to pronounce and decree for damages in the said sum of Ten Thousand Dollars ($10,000.00) and the further sum of Three Thousand Five Hundred Dollars ($3,500.00) on libelant's second cause of suit, together with the costs

of this proceeding, against said steamship "Taigen Maru", her tackle, apparel, engines, boilers and furniture, and against the surety upon any claimant's bond, and for such other relief to the libelant as to law and justice appertain, and also to condemn said steamship, her engines, apparel, boilers, tackle and furniture to be sold to pay the same.

Peter Von der Weyde, Libelant.

Lord & Moulton,
Proctors for Libelant.

[fol. 8] *Duly sworn to by Peter Van Der Weyde. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIM OF OWNERSHIP—Filed April 25, 1931

To the Honorable Judge of the Above Entitled Court:

Ocean Transport Co. Ltd. (Taiyo Kaiun Kabushiki Kaisha, a Japanese corporation) as owner of the above named respondent steamship "Taigen Maru", her engines, boilers, machinery, tackle, apparel and furniture, intervening for its interest as such owner, appears by and through R. Konno, its agent, and claims said steamship, her engines, boilers, machinery, tackle, apparel and furniture, and prays that it be permitted to defend accordingly, and that the above entitled court decree restitution to it of said steamship, and other wise administer right and justice in the premises.

Ocean Transport Co. Ltd., a corporation, (Taiyo Kaiun Kabushiki Kaisha) , by R. Konno, As its Agent.

[fol. 10] UNITED STATES OF AMERICA,
State of Washington, County of King, ss:

R. Konno, being first duly sworn, upon oath deposes and says:

That he is the agent and attorney-in-fact of and for Ocean Transport Co. Ltd. (Taiyo Kaiun Kabushiki Kaisha), the

claimant above named in the foregoing claim of the respondent steamship "Taigen Maru", and makes said claim and this affidavit in support thereof, for and on its behalf, being thereunto duly authorized.

That said Ocean Transport Co. Ltd. (Taiyo Kaiun Kabushiki Kaisha), a Japanese corporation, is, and at the time of the attachment of said respondent steamship in the above entitled action was the true and bona fide chartered owner of said steamship, her engines, boilers, machinery, tackle, apparel and furniture, and as such now is and at said time was solely entitled to the possession thereof.

R. Konno.

Subscribed and sworn to before me this 22 day of April, 1931.

Lane Summers, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

[File endorsement omitted.]

[fols. 11 & 12] Cost bond for $250.00 approved and filed April 25, 1931 omitted in printing.

[fols. 13-15] Release bond for $13,500 approved and filed April 25, 1931 omitted in printing.

[fol. 16] In United States District Court

[Title omitted]

Affidavit of Lane Summers—Filed April 25, 1931

United States of America,
State of Washington,
County of King, ss:

Lane Summers being first duly sworn on oath, deposes and says:

That he is one of the attorneys of record for claimant Ocean Transport Co., Ltd.; that he makes this affidavit in connection with application to release the respondent Steamship "Taigen Maru."

That upon April 22, by long distance telephone Mr. Lord of the law firm of Lord & Moulton, Portland, Oregon, proc-

tors for libelant, orally stipulated that release bond in the sum of Thirteen thousand five hundred dollars ($13,500.00) would be adequate and acceptable; that in confirmation of such agreement Mr. Lord caused to be sent to affiants firm telegram, true copy of which is as follows:

"Portland, Ore. 22, 1931, Apr. 22, AM 10:34.

[fol. 17] Lane Summers, Care Hayden, Merritt, Summers & Bucey—Central Building, Seattle, Wash.

We approve bond in sum of Thirteen thousand five hundred dollars Van Der Weyde against Taigen Maru we have no objection form of bond or to sureties Judge Cushman may approve bond tendered by you in this case without further notice to us.

Lord & Moulton," Lane Summers.

Subscribed and sworn to before me this 22 day of April, 1931.

F. S. Merritt, Notary Public in and for the State of Washington, residing at Seattle. (Seal.)

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR INTERVENTION BY NORWEGIAN CONSUL

Comes now C. Stang Anderson, Acting Consul of the Kingdom of Norway, resident at Seattle, and petitions for an order of court granting leave to intervene in the above entitled cause, for the purpose of filing exceptions and exceptive allegations directed to the libel in said cause. This petition is based upon the record in the above entitled cause, together with petitioner's verified exceptions and exceptive allegations, a copy of which is hereunto attached and by this reference made a part hereof.

Dated this 10 day of December, 1932.

C. Stang Anderson, Hayden, Merritt, Summers & Bucey, Proctors for Petitioner.

[fol. 19] *Duly sworn to by C. Stang Anderson. Jurat omitted in printing.*

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING INTERVENTION BY NORWEGIAN CONSUL—Filed Dec. 12, 1932

The above entitled cause having come on regularly for hearing upon the petition of C. Stang Anderson, as Acting Consul of the Kingdom of Norway, resident of Seattle, for an order of court granting leave to intervene for the purpose of filing exceptions and exceptive allegations, and the court having been fully advised:

Now, therefore, it is hereby ordered that C. Stang Anderson, as such Acting Consul of the Kingdom of Norway, be, and he hereby is, granted leave to file exceptions and exceptive allegations, a copy of which is attached to said petition, and to make any other showing as such Acting Consul which shall be deemed appropriate by this court.

Done this 12 day of December, 1932.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLAIMANT'S EXCEPTIONS TO LIBEL—Filed Dec. 12, 1932

Exceptions of Ocean Transport Co. Ltd., a corporation, claimant, to libel in the above entitled cause of Peter Van der Weyde, libelant, show:

I

(1) That heretofore, and on September 15, 1922, there was instituted a suit in admiralty by the filing of a libel in rem in behalf of Peter Van der Weyde, as libelant, against the steamship "Luise Nielsen," as respondent, to

recover damages (inclusive of wages, maintenance and cure) in the sum of $8410.00, for personal injuries alleged to have been suffered as the result of unwholesome food, and as the result of a fall on or about May 12, 1922, through an open, unguarded, unlighted hatch, while libelant was employed on board said steamship as a seaman.

(2) That thereafter, on September 15, 1922, due process in rem was issued upon said libel against said steamship [fol. 22] "Luise Nielsen," which same, upon September 16, 1922, was seized by the United States Marshal. That to obtain release thereof from custody, upon September 19, 1922, claim of ownership and bond in the form of a stipulation to abide and pay the decree, were filed by the master of said steamship, in behalf of B. Stolt Nielsen & Company, Inc., a corporation, as owner thereof.

(3) That on October 5, 1922, answer to said libel was filed by said claimant, B. Stolt Nielsen & Company, Inc.

(4) That on January 30, 1923, and on September 22, 1923, claimant's depositions of witnesses Gustav Brekke, Jacob Marcelius Velde, Leonard Alf Revang and J. M. Velde, together with Exhibits A, B, C, X, Y, Z, P and Q, were filed.

(5) That on April 9, 1924, there was entered an order of court, granting petition for intervention by the Norwegian Consul, at which time such petition and exceptive allegations were filed by said Norwegian Consul.

(6) That after argument upon such exceptive allegations, said libelant on May 5, 1924, filed an amended libel, and sought leave to plead the Asiatic American Steamship Company as an additional party respondent, which leave was granted by order of court on May 12, 1924, whereupon monition against such additional respondent was issued forthwith.

(7) That by such amended libel, said libelant reiterated and reasserted, with some amplification, his said cause of action upon the same grounds and for the same personal injuries alleged by his original libel—the only substantive change effected by the amended libel being to allege that the respondent Asiatic American Steamship Company, by virtue of a certain charter party, was the owner of said

vessel pro hac vice, and as such in charge and in control [fol. 23] thereof and hence personally liable to indemnification of libelant for his said injuries.

(8) That on May 19, 1924, said respondent Asiatic American Steamship Company filed its answer to said amended libel, denying the allegations to the effect that it was owner pro hac vice of said steamship.

(9) That on May 28, 1924, said claimant filed its answer to said amended libel, wherein claimant admitted the ownership of said steamship as of the time when libelant sustained his alleged injuries, but denied such ownership as of the date of its answer; wherein claimant denied that respondent Asiatic American Steamship Company was the owner of said steamship pro hac vice, and denied numerous other material allegations of said amended libel.

That claimant, by such answer, for its affirmative defenses, alleged that said libelant was a Dutchman, being a subject of the Queen of the Netherlands; alleged that said steamship was a Norwegian vessel, flying the Norwegian flag, and owned and operated by a Norwegian corporation; alleged that the contract of hiring between said steamship and said libelant contained, among others, provision that "he (libelant) shall serve on board the ship in the capacity of able seaman and ordinary seaman, with obligations and rights as are stated in the maritime law of the 20th of July, 1893, (Norwegian law)," and that "any disagreement as to the interpretation of this contract shall be temporarily decided by the Norwegian Consul, and not in a foreign country be brought in a foreign court;" alleged that certain quoted provisions of the Norwegian maritime law were applicable to the rights and obligations of said libelant, said steamship and said claimant; alleged [fol. 24] that in addition to such provisions of the Norwegian maritime law there was at the time of libelant's injury in force in Norway a Seamen's Compensation Act, known as the law of August 18, 1911, relating to the insurance of seamen against accidents, providing for compensation insurance from a state-administered fund for injured Norwegian seamen and for foreign seaman injured on Norwegian vessels whose countries extend reciprocal rights to Norwegians on their vessels, and providing that if an accident renders it necessary to send an injured seaman

to a hospital, the Royal Accidents Insurance Office of Norway will make payment of the expenses connected with the treatment and maintenance of such injured seaman, even though he be a foreigner, without possessing or claiming any right to reimbursement from the owner of the ship upon which such injury occurred, and further providing in the first paragraph of Section 32 of said law that "accidents coming within the scope of this law" (of which the accident to libelant in the present cause is one) "impose no obligation upon the owners, master, or other officer of the ship concerned to pay personally, or out of the ship's estate (ship and freight) any compensation, unless it has been proved by a penal sentence that one or the other of such persons has caused the injury with intent or through gross negligence"; and alleged that libelant had theretofore been cared for in a hospital and maintained at an expense of over $1800.00.

(10) That on May 28, 1924, hearing was had by said District Court of the United States for the District of Oregon, Honorable Robert S. Bean, judge presiding, at which hearing oral testimony and written depositions were offered, received and considered upon the issues presented by [fol. 25] the exceptions and exceptive allegations of such Norwegian Consul, and upon the issues presented by the amended libel of libelant and the answer thereto of respondent Asiatic American Steamship Company and claimant B. Stolt Nielsen & Company, Inc.

(11) That as the result of such pleadings and the evidence received by said court at such hearing, there was entered by said court its final decree on June 2, 1924, whereby said amended libel of libelant was dismissed, with costs in favor of claimant, B. Stolt Nielsen & Company, Inc. and respondent Asiatic American Steamship Company.

(12) That no appeal was ever taken by appellant or any other party litigant in said cause from said decree; that no application for review of said decree by any appellate court was ever made; that the time within which to appeal from said decree or to cause review thereof to be made by any appellate court has long expired. That said decree is now a final decree, completely determining and adjudicating the rights and obligations of said libelant and of said

steamship "Luise Nielsen," arising out of all causes of action stated by or involved in said amended libel.

II

(1) That Peter Van der Weyde, the libelant in said cause herein described, is the same person who is libelant in the present cause now pending. That the steamship "Luise Nielsen," respondent in said former admiralty cause, is the same steamship impleaded as respondent in the present cause now pending, the name of such steamship having been heretofore changed to the steamship "Taigen Maru."

(2) That the subject matter and the causes of action pleaded by and involved in said former admiralty cause [fol. 26] above described are identical with those pleaded by and involved in the present admiralty cause now pending.

III

That said libelant is barred from maintaining the present admiralty cause by the complete and final adjudication of the United States District Court for the District of Oregon in said former admiralty cause above described. That the present admiralty cause is res judicata.

IV

That a certified copy of the record in said former admiralty cause, being No. A-9008 of the files of the United States District Court for the District of Oregon, entitled "Peter Van der Weyde, Libelant, v. The Steamship 'Luise Nielsen', her tackle, apparel, engines, boilers and furniture, and Asiatic American Steamship Company, a corporation, Respondents, B. Stolt Nielsen & Company, Inc., a corporation, Claimant," is presented to the above entitled court and filed with the clerk thereof as a basis for and as a part of claimant's foregoing exceptions, being incorporated therein by this reference. That such record of said former cause so presented and filed, among other papers, includes the following pleadings and documents, to-wit:

Certified transcript of docket entries;
Certified copy of libel;
Warrant of Arrest;

Marshal's return of seizure;
Claim of Ownership;
Answer of Claimant;
Claimant's Interrogatories;
Petition of Norwegian Consul for Intervention;
[fol. 27] Order allowing intervention;
Exceptive allegations of Norwegian Consul;
Amended Libel;
Monition;
Return of Service on Monition;
Answer of Respondent to Amended Libel;
Answer of Claimant to Amended libel;
Final decree;
Stipulation as to record;
Order as to record;
Libelant's answers to interrogatories;
Clerk's certificate dated June 23, 1931;
Clerk's certificate dated July 14, 1931;
Original depositions, filed January 30, 1923, of witnesses Gustav Brekke, Jacob Marcelius Velde, and Leonard Alf Revang;
Original deposition, filed September 23, 1923, of witness J. M. Velde;
Transcript of testimony of Stanley P. Fleming and Peter Van der Weyde, received at hearing May 28, 1924;

Exhibits:

A, being official log book;
B, being form of agreement, in Norwegian;
C, being official crew list;
X, being employment contract bearing libelant's signature;
Y, being translation of contract;
Z, being volume of Norwegian shipping laws;
P, being translation of Section 90 of the Norwegian maritime law;
Q, being translation of Section 100 of the Norwegian maritime law;

[fol. 28] Wherefore, claimant prays:

(1) That libel in the above entitled cause be dismissed because libelant's cause of action is barred by former final adjudication;

(2) That if claimant's exceptions be overruled, claimant be allowed time within which to plead to said libel by answer.

Hayden, Merritt, Summers & Bucey, Proctors for Claimant.

Office and Post Office Address, 540 Central Building, Seattle, Washington.

Duly sworn to by Lane Summers. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

EXCEPTIVE ALLEGATIONS—Filed Dec. 12, 1932

To the Honorable E. E. Cushman, Judge of the above entitled Court:

Your Petitioner, C. Stang Anderson, Acting Consul of the Kingdom of Norway, having leave to intervene herein and file exceptions or exceptive allegations, now files exceptive allegations, praying consideration thereof, as follows:

I

That said Petitioner, C. Stang Anderson, is the duly accredited Acting Consul of the Kingdom of Norway at Seattle, Washington.

II

That the respondent steamship "Taigén Maru", at all times mentioned by the libel in the above entitled cause, then known as the steamship "Luise Nielsen," was a Norwegian vessel flying the Norwegian flag, being owned and operated by subjects of the Kingdom of Norway, to-wit, B. Stolt Nielsen & Company, Inc., a corporation.

[fol. 30] III

That as your Petitioner is informed and believes, libelant is a subject of Her Majesty the Queen of the Netherlands.

IV

That by the general maritime law said libelant was at the times mentioned by said libel a member of the crew of said steamship "Luise Nielsen", and as such a subject to His Majesty the King of Norway, in so far as his rights and obligations as a seaman were concerned, and was governed and bound by the laws of the Kingdom of Norway.

V

That the law of the Kingdom of Norway regarding compensation and care of seamen on Norwegian vessels, which was in force at the time libelant signed ship's articles for the voyage on said steamship "Luise Nielsen" during which he was hurt, and which was still in force at the time libelant was injured, and likewise still in force at the present time, is as follows:

"Sec. 90. If any member of the crew is taken ill, or has been injured after commencing his service, it is the Master's duty to procure him the necessary treatment on board or ashore, but if his condition is such as to unfit him for service for a long term, or if he is suffering from syphilis, he may be dismissed at once. If such takes place abroad the Master shall hand him over to the Consul, or, if there is no Consul at the place, otherwise provide for his proper maintenance.

"If a seaman is dismissed on account of illness, or injuries contracted by his own default, or syphilis, his wages shall be payable only for the time of his service, and there may be deducted therefrom the expenses incurred by his treatment and care. If he is not dismissed, his wages shall be forfeited for the time he is incapable of working, and he must himself pay the expenses incurred by his treatment.

"In all other cases of sickness or injury, a sick, or in- [fol. 31] jured seaman shall, if he is not dismissed, be entitled to enjoy his full wages during his illness, and the necessary treatment at the cost of the owners. If he is dismissed he shall receive his wages until his discharge takes place, or if no such takes place, up to the day of the departure of the ship, and, besides, maintenance and treatment at the expense of the owners during 4 weeks, if in Norway, or at any place abroad where, under the Agree-

ment, the seaman may be dismissed, but otherwise during 12 weeks, counting from the discharge of the seaman, or, if no discharge takes place, from the departure of the ship. If there is no Norwegian Consul at the place, to whom the sick seaman can be handed over, and the Master is thereby compelled to make advances for the medical care and maintenance of a Norwegian seaman abroad, which, according to the rules herein above contained, the owners are not bound to bear, such owners shall be entitled to demand reimbursement of their advances from the State Treasury. The State cannot make any claim on the seaman on account of such outlays.

"Sec. 100. If a seaman is dissatisfied with the settlement of his account made out by the Master, he may demand that the dispute shall be decided by the discharging officer.

"If, otherwise, any dispute relating to ship service should arise between the Master and a seaman while the ship is abroad, the case shall be submitted to the decision of the Consul appointed at the place, or at the first place where there is a Norwegian Consul.

"The decision of the Consul shall be deemed binding on the parties, until the case can be brought before the Norwegian Court of Justice."

VI

That the ship's articles with said steamship "Luise Nielsen" which libelant signed for the voyage during which his injury occurred, were and are as follows:

"Contract of Hiring

"Shipmaster J. M. Velde, Master of the Steamship Luise Nielsen, belonging to Haugesund, has engaged the following members of crew born the —— at ——, to ac-
[fol. 32] company the vessel from Astoria to Orient and further (to accompany the ship for a time of —— months) (to accompany the ship from Astoria and back to America) on the following conditions:

"1) that he shall serve on board the ship in the capacity of able seaman and ordinary seaman with obligations and rights as are stated in the maritime law of the 20th of July, 1893.

"2) that he shall commence the service on board the —— (date) —— (hour).

"3) that the wages will be 200 kroner per month for able seamen counted from the day the service commences, (that the wages will be 150 kroner per month for ordinary seamen).

"4) that the discharge shall be effected at the latest, the 2nd working day after the service on board the ship has ceased.

"5) any disagreement as to the interpretation of this contract shall be temporarily decided by the Norwegian Consul, and not in a foreign country be brought in a foreign court.

"For overtime will be paid —— Ore (a fraction of a korner per hour.

Able seamen	Ordinary seamen
Otto Olsson,	Jesse E. Blum,
Sulo Seppa,	Peter Van der Weyde,
	Roy Brunner.

"In witness whereof both have signed by their own hands.

—— (place) —— (date).

"The above contract in my presence has been read and agreed after the seaman has been asked by me if there have been any promises that have not been stated in the contract. Certified to.

—— ——."

VII

That in addition to the provisions of the law of the Kingdom of Norway, heretofore quoted, the law of that country [fol. 33] effective at the time of libelant's alleged injury, included a Seamen's Compensation Act, known as the Law of August 18, 1911, relating to the insurance of seamen against accidents. This enactment provided from a state-administered fund compensation insurance to injured Norwegian seamen, and also to foreign seamen injured on Norwegian vessels, whose countries extended reciprocal rights to Norwegians on their vessels. That by such enactment it was provided that if the accident renders it necessary to send the injured seaman to a hospital, the Royal Accidents Insurance Office will undertake payment of ex-

penses in connection with the treatment and maintenance of the seaman injured, even though he be a foreigner, without claiming or possessing any right to reimbursement from the owners of the ship. That by the first paragraph of Section 32 of such enactment it is provided that: "accidents coming within the scope of this law" (of which the accident to libelant in the present cause is one) "impose no obligation upon the owners, master, or other officer of the ship concerned to pay personally, or out of the ship's estate (ship and freight) any compensation unless it has been proved by a penal sentence that one or other of such persons has caused the injury with intent or through gross negligence."

VIII

That as your petitioner is informed and believes, after the injury described by said libel was sustained, libelant received medical, nursing and hospital care in a hospital at Astoria, Oregon, at the expense of the owner of said steamship "Luise Nielsen" ("Taigen Maru") and the Norwegian government, to an amount in excess of $1800.00 —approximately $2000.00.

[fol. 34]

IX

That all of the foregoing facts in respect to the several provisions of the Norwegian law, the ship's articles, and the relief afforded to libelant, have been disclosed and established by sworn testimony of record in a former admiralty cause, instituted by the same person who is libelant herein, against the same steamship which is respondent herein (then named the steamship "Luise Nielsen") such former admiralty cause being No. A-9008 in the United States District Court for the District of Oregon, entitled: "Peter Van der Weyde v. The Steamship 'Luise Nielsen', etc., Respondent," a certified copy of the record in which cause has been transferred to the present cause, and made a matter of record herein.

X

That despite the fact that said steamship, formerly the "Luise Nielsen", now the "Taigen Maru", is now a Japanese vessel, and no longer a Norwegian vessel, your petitioner as Norwegian Consul is nevertheless officially concerned, by virtue of the fact that in making sale of said steamship to the present Japanese owner thereof, the

former Norwegian owner, B. Stolt Nielsen & Company, Inc., obligated itself to deliver said steamship "free from all debts and encumbrances", as a result of which obligation such former Norwegian owner is interested in the adjudication of any claims against said vessel, in accordance with the rights and obligations arising from the Norwegian law effective at the time such claim accrued.

Wherefore, your petitioner prays:

(1) That by order of this court the libelant's cause of action in the above entitled cause be dismissed as having been finally adjudicated by the United States District Court [fol. 35] for the District of Oregon:

(2) That if not dismissed as res judicata, the present cause be dismissed upon the foregoing exceptive allegations, and the dispute between libelant and respondent be left by this court undetermined, subject to adjustment and disposition by petitioner as such Consul, in accordance with said steamship's articles and the controlling law of Norway;

(3) And that in the event this court retains jurisdiction in the present cause, it will refer the dispute involved herein to petitioner as such Consul, for adjustment and disposition in accordance with such ship's articles and such laws of Norway.

C. Stang Anderson, Petitioner. Hayden, Merritt, Summers & Bucey, Proctors for Petitioner.

[fol. 36] *Duly sworn to by C. Stang Anderson. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO FILING RECORD IN PREVIOUS CAUSE, ETC.—Filed Dec. 16, 1932

Whereas, the undersigned proctors for libelant were also proctors for the same libelant in former litigation hereinafter described;

Now, therefore, it is hereby stipulated that claimant may file certified transcript of record in admiralty cause No. A-9008 of the files of the United States District Court for the District of Oregon, entitled "Peter Van der Weyde, Libelant, vs. Steamship 'Luise Nielsen', etc., Respondent", in the above entitled cause, and that the same may be considered part of claimant's exceptions to libel, without a copy thereof being attached to and served with copy of such claimant's exceptions to libel as served upon the undersigned proctors for libelant.

Lord & Moulton, Proctors for Libelant. Hayden, Merritt, Summers & Bucey, Proctors for respondent and claimant.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

RECORD ENTRY OF HEARING—Jan. 9, 1933

On this 9th day of January, 1933, this cause comes on for hearing on Claimants' Exceptions to Libel and Exceptive Allegations of Intervenor, Norwegian Consul, Claimant and Intervenor appearing by Lane D. Summers, their counsel and counsel for Libelant not appearing. At the conclusion of the argument by counsel for Claimant and Intervenor the Court announces from the bench that he declines to entertain jurisdiction. Order is to be presented.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

RECORD ENTRY OF HEARING—Jan. 23, 1933

On this 23rd day of January, 1933, this cause comes on for presentation of proposed Order of Dismissal, the Libelant appearing by Mr. Lord of Messrs. Lord and Moulton and Claimant appearing by Lane D. Summers of Messrs. Hayden, Merritt, Summers and Bucey. Counsel for Claimant waives any ruling heretofore made on Excep-

tive Allegations and argument is now had on the same. The Court announces from the bench that the Court declines to entertain jurisdiction, cause is dismissed and proctor for Libelant is given leave to file affidavits not later than Thursday. Proposed Decree is lodged with the Clerk and is to be noted on the calendar for Saturday.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESPONSE TO EXCEPTIVE ALLEGATIONS—Filed Jan. 26, 1933

Now comes Peter Van der Weyde, libelant herein, and responds to the exceptive allegations of C. Stang Anderson, acting counsel of the Kingdom of Norway, and admits, denies and alleges as follows:

Admits Paragraphs I, II, III, IV, V, VI, VII, VIII and IX thereof.

For a further and separate response to said exceptive allegations, libelant alleges:

I

That libelant is a resident alien of the United States, having been born in the Kingdom of The Netherlands, and arrived in the United States in July, 1907, and deserted the S. S. Marquette, a vessel of English registry, upon which he was a seaman, and ever since said time has lived in the United States, except for occasional voyages which libelant has made as a seaman upon vessels of American registry.

II

That on the 17th day of March, 1922, libelant was employed as a seaman on the Steamship Luise Nielsen, then [fol. 41] owned as alleged in the exceptive allegations, for a round trip voyage between the port of Portland, Oregon, and the Orient, to be discharged at the port of Portland; that said vessel at said time was chartered to an Oregon corporation known as the Asiatic-American Steamship Company, but under the terms of said charter the registry of said vessel remained under the laws of Norway, and the

crew were in the employ and pay of the owners; that a cargo was loaded on said vessel at the port of Portland, which was discharged in Japanese and Chinese ports, and a cargo was taken aboard there and discharged in the port of Portland.

III

That on the 16th day of May, 1922, libelant met with certain personal injuries which are set forth in the libel on file herein, to which reference is hereby made, and hereby incorporated herein; that thereupon libelant was placed under medical care and received hospital attention, as alleged in the exceptive allegations; that libelant's injuries were of such a nature that libelant is almost totally and permanently disabled from following any gainful occupation, and that said fact was well known at the time of the hearing of the admiralty proceeding referred to in the exceptions of the claimant herein and in the exceptive allegations of said C. Stan Anderson, being the suit instituted by libelant at the time libelant filed the libel in the United States District Court for the District of Oregon referred to, and at the time of the hearing of the petition of the Norwegian consul for intervention in said suit referred to in the exceptive allegations.

IV.

That at the time of the trial of said suit, when the said Norwegian consul at Portland did claim in open court that under the laws of the Kingdom of Norway libelant was entitled to receive and be paid a compensation, which laws are similar in import to the compensation laws now adopted [fol. 42] by many states, and did state that said Peter van der Weyde would be paid said compensation, and that R. S. Bean, the judge trying said proceedings, did thereupon refuse to take jurisdiction of the proceedings against said S. S. Luise Nielsen to recover damages for the personal injuries sustained by said Peter van der Weyde, as alleged in his libel; that at said time libelant was still disabled and suffered great physical pain, and it was libelant's intention to return to his mother's home in The Netherlands, where libelant would be able to live in comparative comfort on the compensation which would be paid him under the said Norwegian laws; that time expired and libelant called

upon said Norwegian consul and requested the said Norwegian consul to pay said compensation; that said Norwegian consul informed libelant that said "money was lying in Norway" under a Norwegian insurance act; that every few months thereafter libelant did call at the office of said consul to inquire whether said compensation had been received, and time kept passing without the payment of said compensation, or the exhibition of any written instructions by said Norwegian consul regarding the compensation payable to libelant; that thereupon on the 11th day of January, 1929, libelant wrote the Minister from The Netherlands as follows:

January 11, 1929.

"The Minister from The Netherlands, Washington, D. C.

SIR:

At the request of Peter Van der Weyde, a citizen of Holland, residing in the United States, we are submitting to you for such action as may be appropriate, the question of securing him money on account of personal injuries sustained while employed as a sailor on the S. S. "Luise Nielsen". The facts are that Mr. van der Weyde shipped on a round trip voyage from Portland, Oregon, to the Orient and return. The vessel was flying the Norwegian flag and was owned by B. Stoltz Nielson & Company of Haugesund, Norway, but had been chartered to the Asiatic American Steamship Company, an Oregon corporation. The charter did not change the ownership to that of pro hac visa of the Oregon company, so the vessel still remtined a Norwegian vessel.

On the 16th day of April, 1922, Mr. van der Weyde met with an accident by falling through a hatchway which had been left open and was unlighted. The accident resulted [fol. 43] in a fracture of the right femur, injuries to the back and head, and without going into detail as to the extent of the injuries, we may say that his injuries are so permanent and disabling that he never again will be able to resume heavy employment. There is some light work which he might possibly be able to do.

Believing that the case would be governed by the principles of American maritime law, inasmuch as the employment was made in the United States and contemplated a

round trip voyage, etc., a libel was filed against the vessel with a view of securing an indemnity for the injuries done. There was no legal defense to this action because the negligence was so flagrant, but the court on the motion of the attorneys for the Steamship Company, dismissed the suit on the theory that the "law of the flag" controlled and bound the rights of the seamen on the ship, and under the laws of Norway no lien was given against the ship in such cases, but that these laws provided a compensation in the form of monthly payments. It was loudly proclaimed in court that the company had expended vast sums of money in endeavoring to effect a cure of the injured seaman, and that they desired to make payments of compensation in accordance with the laws of Norway, and it was upon this suggestion that the court took the view that he would not apply the American maritime law to the case, inasmuch as a fixed compensation was already provided, and he would not therefore exercise his discretionary right and refusal to apply the law of the United States.

Repeated demands were made by the local Consul for The Netherlands upon the Norwegian consul to pay this compensation, but it has never been paid.

We are writing with a view that you take such official action as may be necessary to secure the payment of this compensation. Further information will be gladly furnished if required.

Respectfully yours, Lord & Moulton, by Wm. P. Lord."

Libelant received the following answer to the above letter:

"Royal Netherlands Legation
Washington, D. C., 9 February, 1929.

SIRS:

In answer to your letter of January 11, 1929, I have the honor to inform you that the Norwegian Steamship Company, B. Stoltz Nielson & Company, of Haugesund, has done everything that can be claimed by Peter van der Weyde ground of the treaty of March 7, 1911, between the Netherlands and Norway concerning maritime accidents and indemnifications. Further the convention of January 9,

1925, between said countries is not applicable in this case as van der Weyde does not reside either in the Netherlands or in Norway.

Yours very truly, J. H. Van Royes, Netherland Minister.

V

[fol. 44] That thereafter libelant continued to request the payment of said compensation, but said compensation has never been paid; that in the meantime, as alleged in the libel, said steamship was sold, but libelant is informed and believes and therefore alleges it to be true, that said steamship was sold by the owners with a warranty to said owners against all claims for damages of every nature and description incurred prior to said sale, and the terms of said sale provided that the purchasers of said steamship would be indemnified against any and all loss on account of any claims being made by any person prior to said sale, and that the vendors would defend any and all such suits, and said steamship was protected by a P. and I. policy with the Assuranceforefingen Skuld of Oslo, Norway, by the terms of which the former owners were insured against loss by reason of the making of any claim, and said policy was in full force and effect at the time libelant was injured, and at the time said vessel was sold; that libelant's said cause was not tried on the merits as to the charge whether said vessel was unseaworthy, and was tried only upon the intervention of the said Norwegian consul at Portland, Oregon.

VI

That said vessel, to libelant's knowledge, has not been within the District of Oregon for a long time prior to the filing of the libel herein; that libelant would have again libeled said vessel if said vessel had been within the jurisdiction of a court within a reasonable distance of where libelant resided, except for the fact that libelant believed that he would be paid the compensation as alleged.

VII

That libelant believes and therefore alleges it to be true that the present owners of said steamship are not interested in the result of libelant's claim, but on the contrary the [fol. 45] defense of this claim is being made by the Assur-

anceforeningen Skuld of Oslo, Norway; that due to the fact that jurisdiction of the court in said proceedings was discretionary, libelant prays that his rights be determined and ascertained, that is to say: that this Court proceed and assess damages under the general principles of the maritime laws of the United States relating to seamen, if the court should be so advised after the hearing of the testimony herein, or if the court be of the opinion that the benefits of the Workmen's Compensation Act should be paid libelant, the court should compel the intervenor to arrange for the payment of said compensation. Libelant further avers that the parties hereto are not prejudiced by the loss of witnesses, inasmuch as there are two witnesses to said accident, viz., Wm. Butnek who resides in Portland, Oregon, and Jack Vanderwerf, who resides near Scappoose, Oregon, both actual witnesses to said account.

Wherefore libelant prays that the exceptive allegations herein be denied and that libelant be awarded relief according to the general principles of the maritime law, as adjudicated by the courts of the United States, and that he be allowed an indemnity for his injuries as prayed for in the libel; that if the court be of the opinion that the jurisdiction should not be entertained, to award libelant indemnity according to the course of the general principles of the maritime law of the United States, then that the court award libelant the sums he would be entitled to be paid as compensation under the laws of the Kingdom of Norway; that libelant be allowed his costs and disbursements incurred herein.

Wm. P. Lord, Arthur I. Moulton, Proctors for Libelant.

[fol. 46] *Duly sworn to by Peter Van der Weyde. Jurat omitted in printing.*

STATE OF OREGON,
County of Multnomah, ss:

I, Arthur I. Moulton, being first duly sworn, on oath says: I am one of the attorneys of record herein for libelant on the 25th day of January, 1933. I served the within Response on the attorneys for the claimant and intervenor herein, by depositing a true copy thereof, duly certified to be such by me, in the United States Postoffice at Portland,

Oregon, the same being enclosed, securely sealed and plainly addressed to Messrs. Hayden, Merritt, Summers & Bucey, Central Building, Seattle, Wash., attorneys of record for claimant and intervenor, fully prepaying the postage thereon.

(Signed) Arthur I. Moulton.

Subscribed and sworn to before me this 25th day of January, 1933. (Signed) Marie Bennett, Notary Public for Oregon. (Seal.)

[File endorsement omitted.]

[fol. 47] In United States District Court

[Title omitted]

Order of Dismissal—Filed Jan. 28, 1933

The above entitled cause having duly and regularly come on for hearing upon January 9 and 23rd, 1933, before the above entitled court, the undersigned judge presiding, upon the exceptive allegations of the Intervenor, C. Stang Anderson, as Consul of the Kingdom of Norway, and upon the exceptive allegations of the claimant, Ocean Transport Co. Ltd., upon the latter date Libelant appearing by his proctor, Wm. P. Lord and orally responding to such exceptive allegations and having been allowed further time in which to reduce to writing and file such responses and such having been done; and the court having given consideration to the consular protest against jurisdiction being entertained in the above entitled cause, and Libelant's response thereto, and having concluded that, in the exercise of its discretion the Court should not hear said cause upon the merits:

Now, therefore, it is hereby ordered:

1. That said cause be and the same hereby is dismissed.

2. That the release bond and the stipulations for costs, filed by said claimant and said intervenor, be and they hereby are discharged, and the sureties thereon exonerated.

3. That said intervenor and said claimant have and recover from the libelant lawful costs hereinafter to be taxed.

Done this 28th day of January, 1933.

Edward E. Cushman, Judge.

[File endorsement omitted.]

Service admitted Jan. 17, 1933.

Lord & Moulton, per L.

[fol. 48] In United States District Court

[Title omitted]

Memorandum of Costs and Disbursements—Filed Feb. 7, 1932

Disbursements	Amount claimed	Amount allowed
Clerk's fees	$ 5.00	
Marshal's fees and charges on release of vessel	1.25	
Attorneys' fees	20.00	
Premium on respondent's stipulation for costs (2 years)	20.00	
Premium on bond for release of vessel (2 years)	270.00	
Paid G. H. Marsh, Clerk, U. S. District Court for District of Oregon, for certified copy of record in former cause, Peter Van der Weyde, libelant, vs. Steamship "Luise Nielsen", etc., filed in support of claimant's exceptions to libel	23.80	
Clerk's fees for filing petition for intervention of C. Stang Anderson, Norwegian Consul	2.00	
Taxed	$342.05	$ .....

Taxed —— —, 1933.

—— ——, Clerk.

Duly sworn to by Lane Summers. Jurat omitted in printing.

[fol. 49] To Lord & Moulton, 1107 Spalding Bldg., Portland, Oregon, Proctors for Libelant:

You will please take notice that on the 13th day of February, 1933, at the hour of 10 o'clock A. M., application will be made to the Clerk of said Court, to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

Hayden, Merritt, Summers & Bucey, Proctors for Claimant and Respondent.

Due service of the within and foregoing Memorandum of Costs and Disbursements and notice of the taxation thereof by the receipt of a true copy thereof, hereby is admitted in behalf of all parties entitled to such service by the Rules of Court, this 2nd day of February, 1933.

Lord and Moulton, Proctors for Libelant.

[File endorsement omitted.]

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTION TO TAX COSTS—Filed April 11, 1933.

The above entitled matter having come on for hearing before the above entitled court, the undersigned judge presiding, upon claimant's motion for taxation of costs, and libelant's motion for disallowance of costs, and the court having heard argument, and being advised, and heretofore having orally granted motion to tax costs and denied motion to disallow costs;

Now, therefore, it is hereby ordered that claimant's motion to tax costs as itemized in its cost bill be, and the same hereby is, granted, and libelant's motion to disallow costs be, and the same hereby is denied.

Done this 11th day of April, 1933.

Edward E. Cushman, United States Judge.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed April 21, 1933

To Ocean Transport Co., Ltd., a corporation, claimant above named, and to C. Stang Anderson, intervenor herein, and to Messrs. Hayden, Merritt, Summers & Bucey, your proctors:

You and each of you are hereby notified that Peter van der Weyde, libelant in this suit, intends to appeal and does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final decree and order heretofore and on the 28th day of January, 1933, made and entered in this suit, which final decree adjudged that the libel be dismissed with costs, and that the claimant and the intervenor and their sureties upon the stipulation for costs filed by them, be exonerated from all liability, and libelant hereby appeals from the said final decree and the whole thereof.

Dated at Portland, in the District of Oregon, this 20th day of April, 1933.

Peter Van Der Weyde, Libelant, by Wm. P. Lord, One of His Proctors.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed April 21, 1933

[File endorsement omitted.]

Now comes the above named libelant herein and says that in the record and proceedings in the above entitled cause there is manifest error and said libelant now makes, files and presents the following assignment of errors upon which he will rely.

I

The court erred in dismissing said cause.

II

The court erred in holding that jurisdiction between the libelant and the intervenor, C. Stang Anderson, as consul of the Kingdom of Norway, was a discretionary jurisdiction in the court.

III

The court erred in entertaining the exceptive allegations and in not requiring the claimant and respondent and intervenor to answer.

Wherefore libelant prays that the decree herein be reversed and that the court try this cause de novo in this court and award libelant such damages as he has sustained by reason of the wrongful acts complained about in the libel.

Lord & Moulton, Proctors for Libelant.

[fol. 53] STATE OF OREGON,
County of Multnomah, ss:

I, Wm. P. Lord, being first duly sworn, on oath say: I am one of the attorneys of record herein for libelant; on the 20th day of April, 1933, I served the within Notice of Appeal and Assignment of Errors on the attorneys for the claimant and intervenor herein, by depositing a true copy thereof, duly certified to be such by me, in the United States Postoffice at Portland, Oregon, the same being enclosed in an envelope, securely sealed and plainly addressed to Messrs. Hayden, Merritt, Summers & Bucey, Central Building, Seattle, Wash., attorneys of record for claimant and intervenor, fully prepaying the postage thereon.

(Signed) Wm. P. Lord.

Subscribed and sworn to before me this 20th day of April, 1933. Marie Bennett, Notary Public for Oregon. (Seal.) Commission expires Feb. 17, 1937.

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO PROSECUTE APPEAL WITHOUT GIVING BOND—Filed April 29, 1933

Now comes libelant and moves the court for an order permitting libelant to prosecute this appeal without the filing of a bond.

This motion is based upon the records and files herein wherein it affirmatively appears that the libelant was a seaman on the S. S. "Luise Nielsen" and on the 16th day of May, 1922, was injured during the course of a voyage between the Columbia River and the Orient and return, and that libelant is a seaman within the meaning of Section 837, Title 28, of the Judicial Code.

Lord & Moulton, Proctors for Libelant.

[File endorsement omitted.]

[fol. 55] STATE OF OREGON,
County of Multnomah, ss:

I, Wm. P. Lord, being first duly sworn, on oath say: I am one of the attorneys of record herein for libelant on the 24th day of April, 1933, I served the within Motion and also Memorandum on the attorneys for the claimant and respondent herein, by depositing a true copy thereof duly certified to be such by me, in the United States Post-office at Portland, Oregon, the same being enclosed in an envelope, securely sealed and plainly addressed to Messrs. Hayden, Merritt, Summers & Bucey, Central Building, Seattle, Wash. attorneys of record for claimant and respondent, fully prepaying the postage thereon.

Wm. P. Lord.

Subscribed and sworn to before me this 24th day of April, 1933. Marie Bennett, Notary Public for Oregon. (Seal.)

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR HEARING—Filed April 22, 1933

The Court has been asked to sign a form of order allowing appeal which contains the following:

"* * *, and the libelant is relieved from furnishing any bond for costs on appeal."

The application, insofar as the Court is advised, is without notice to Claimant or Intervenor.

Libelant asks to be relieved from furnishing a bond for

costs upon the authority of Bainbridge vs. Merchants & Miners Transp. Co., 77 L. Ed. 214.

An appeal by Libelant without the giving of a bond is a matter effecting Claimant. The matter of Libelant's right to prosecute his appeal without the giving of a cost bond is assigned for hearing Saturday, April 29th, 1933 at 10:00 o'clock in the forenoon.

The Clerk is directed to notify the proctors for Libelant, Claimant and Intervenor of this Order.

Signed at Tacoma, Washington, this 22nd day of April, 1933.

Edward E. Cushman, Judge.

Rec'd copy 4/22/33.

O. M. Pitzen, Atty. for Libelant.

[File endorsement omitted.]

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

RECORD ENTRY OF HEARING—April 29, 1933

On this 29th day of April, 1933, this cause comes on for hearing concerning libelant's right to appeal without the giving of a cost bond, libelant appearing by O. M. Pitzen for Messrs. Lord, Moulton & Krause and respondent appearing by Mason Wheeler for Messrs. Hayden, Merritt, Summers & Bucey. Claimant files a memorandum; libelant files motion to prosecute appeal and a memorandum, and the matter is now submitted and is taken under advisement by the Court.

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the above entitled Court:

You will kindly prepare for a transcript for the Apostles on Appeal the following documents in the above entitled cause:

Libel;

Claim of Ownership;

Claimant's Stipulation for Costs;

Petition for Intervention by Norwegian Consul;

Order allowing intervention;

Exceptive Allegations of C. Stang Anderson;

Claimant's Exceptions to Libel;

Stipulation for filing certified transcript of record in previous cause in U. S. District Court for Oregon;

Record of proceedings in Oregon cause filed with Clerk;

Order permitting libelant to respond to Exceptive Allegations;

Response to Exceptive Allegations;

Order of Dismissal;

Notice of Appeal;

Assignments of Error;

Application to be relieved from filing Stipulation for Costs on Appeal and proceedings thereon.

Dated this 10th day of May, 1933.

Lord & Moulton, Proctors for Libelant.

[fol. 59] STATE OF OREGON,
County of Multnomah, ss:

I, Wm. P. Lord, being duly sworn, on oath say: I am one of the attorneys of record herein for libelant on the 10th day of May, 1933, I served the within Præcipe on the attorneys for the claimant and respondent herein, by depositing a true copy thereof, duly certified to be such by me, in the United States Postoffice at Portland, Oregon, the same being enclosed in an envelope, securely sealed and plainly addressed to Messrs. Hayden, Merritt, Summers & Busey, Central Bldg., Seattle, Wash., attorneys of record for claimant and respondent, fully prepaying the postage thereon.

(Signed) Wm. P. Lord.

Subscribed and sworn to before me this 10th day of May, 1933. (Signed) Marie Bennett, Notary Public of Oregon. (Seal.) Commission expires Feb. 17, 1937.

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

COUNTER PRÆCIPE OF RESPONDENT AND CLAIMANT

To the Clerk of the above entitled Court:

You will kindly prepare for a transcript for the apostles on appeal the following documents in the above entitled cause, in addition to the documents designated in the libelant's præcipe:

(1) Affidavit of Lane Summers regarding amount of release bond;
(2) Release bond;
(3) Cost bill;
(4) Order granting motion to tax costs;
(5) Minute of journal entry of all orders of the court.

Dated May 15, 1933.

Hayden, Merritt, Summers & Bucey, Proctors for Respondent and Claimant.

[File endorsement omitted.]

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO ORIGINAL EXHIBITS—Filed May 18, 1933

It is hereby stipulated that the Clerk, in transmitting the record in this cause to the Clerk of the United States Circuit Court of Appeals, shall transmit the original exhibits on file with the Clerk of this Court.

Further it is hereby stipulated that prior to the transmittal of such original exhibits, the clerk shall retain the same until June 1, 1933, to afford proctors for respondent and claimant an opportunity to make extracts therefrom.

Dated this 17th day of May, 1933.

(Signed) Lord & Moulton, Proctors for Libelant.

(Signed) Hayden, Merritt, Summers & Bucey, Proctors for Respondent and Claimant.

[File endorsement omitted.]

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR TRANSMITTAL OF ORIGINAL EXHIBITS—Filed May 20, 1933

Based upon the stipulation on file herein, it is hereby ordered that all of the original documents and exhibits incorporated in claimant's exceptions to Libel, be reference, and heretofore filed with the Clerk of the above entitled court (being the records, papers and documents transmitted by G. H. Marsh, Clerk of the United States District Court for the District of Oregon in Cause No. A-9008), to-wit, documents and exhibits hereinafter listed, shall be transmitted to the Clerk of the Circuit Court of Appeals, list of such documents being as follows:

1. Certified transcript of docket entries;
2. Certified copy of Libel;
3. Warrant of Arrest;
4. Marshal's Return of seizure;
5. Claim of Ownership;
6. Answer of Claimant;
7. Claimant's Interrogatories;
8. Petition of Norwegian Consul for Intervention;
9. Order allowing Intervention;
10. Exceptive Allegations of Norwegian Consul;
11. Amended Libel;
12. Monition;
13. Return of Service on Monition;
14. Answer of Respondent to Amended Libel;

[fol. 63] 15. Answer of Claimant to Amended Libel;

16. Final Decree;
17. Stipulation as to record;
18. Order as to record;
19. Libelant's answers to interrogatories;
20. Clerk's certificate dated June 23, 1931;
21. Clerk's certificate dated July 14, 1931;
22. Original depositions filed January 30, 1923, of witnesses Gustav Brekke, Jacob Marcelius Velde, and Leonard Alf Revang;
23. Original deposition, filed September 23, 1923, of witness J. M. Velde;

24. Transcript of testimony of Stanley P. Fleming and Peter Van De Weyde, received at hearing May 28, 1924;

25. Exhibits:

A, being official log book;
B, being form of agreement, in Norwegian;
C, being official crew list;
X, being employment contract bearing libelant's signature;
Y, being translation of contract;
Z, being volume of Norwegian shipping laws;
P, being translation of Section 90 of the Norwegian maritime law;
Q, being translation of Section 100 of the Norwegian maritime law.

Done in open court at Tacoma, Washington, this 20th day of May, 1933.

Edward E. Cushman, Judge.

Approved.

Hayden, Merritt, Summers & Bucey.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE EXTENSION OF TIME—Filed May 18, 1933

It is hereby stipulated between the parties hereto, through their undersigned proctors, that the libelant may have to and including the 19th day of June, 1933, as time within which to docket this cause and file the apostles on appeal with the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated this 17th day of May, 1933.

(Signed) Wm. B. Severyns, (Signed) Lord & Moulton, Proctors for libelant. Hayden, Merritt, Summers & Bucey, Proctors for respondent and claimant.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—Filed May 18, 1933

Based upon the stipulation of the parties hereto, through their undersigned proctors,

It is now hereby ordered that the libelant may have to and including the 19th day of June, 1933, as time within which to docket this cause and file the apostles on appeal with the clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated this 17th day of May, 1933.

Edward E. Cushman, Judge.

Approved as to form.

(Signed) Hayden, Merritt, Summers & Bucey

[File endorsement omitted.]

[fols. 66-67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7192

PETER VAN DER WEYDE, Libelant Appellant,

vs.

The Steamship "TAIGEN MARU" Her Tackle, Apparel, Engines, Boilers and Furniture, Respondent.

OCEAN TRANSPORT CO., LTD., a Corporation, Claimant Appellees.

MOTION FOR ORDER ALLOWING APPELLANT TO PROCEED WITHOUT PREPAYMENT OF COSTS, ETC.—Filed Aug. 21, 1933

Now comes libelant and appellant and moves the court for an order permitting him to proceed in this cause without prepayment of clerk's fees, and that a rule requiring the printing of the transcript and briefs may be dispensed

with, and that the same may be typewritten, and that the clerk may be permitted to refund the filing fee heretofore paid in this cause.

This motion is based on Section 837, of title 28, Judicial Code, permitting the appellant to proceed without prepayment of fees and furnishing bonds on appeal, and also upon a decision of the United States Supreme Court in Bainbridge v. Merchants and Miners Transport Co., 77 L. Ed. 217, 1933 A. M. C. 32 and also upon the affidavit of appellant attached hereto and by this reference made a part of this motion.

(Signed) Wm. P. Lord, Arthur I. Moulton, Proctors for Appellant.

[fol. 69] In United States Circuit Court of Appeals for the Ninth Circuit

[Title omitted]

Affidavit of Peter Van Der Weyde—Filed Aug. 21, 1933

United States of America,
District of Oregon.

I, Peter van der Weyde, being first duly sworn, on oath say: that on the 17th day of March, 1922, I signed on the above steamship as an ordinary seaman. She was then flying the Norwegian flag and had been chartered to make three voyages between the Columbia River and the Orient, and at the time when I signed on was sub-chartered to an Oregon corporation. Practically the entire crew of the vessel were employed in Portland and signed on for a discharge on the Columbia River.

On May 15th, 1922, I fell through a hatch on the vessel and sustained frightful personal injuries from which I have never recovered. I was given hospitalization at the expense of the ship but long before my condition became stationary I was discharged from the hospital and was never paid any maintenance or indemnity on account of my injury. The accident was due to the leaving off of hatches while the vessel was at sea and I was directed to chip rust and fell through the open hatch which was unlighted, etc., [fol. 70] I brought suit for indemnity and the Norwegian vice-consul intervened and set up that the liability of the parties was subject to the law of the flag. It was shown

in evidence before Judge R. S. Bean that Norway provided a compensation act for seamen employed in its vessels and that compensation would be paid me, and on this condition Judge Bean remanded the matter to the consul. I have never been paid a cent and my demands to the consul here have been put off with promises and my demands to the foreign minister have been ignored.

Eventually the vessel was sold to Japanese interests and when the vessel returned to Puget Sound I caused the vessel to be libeled and the Norwegian vice-counsul intervened and it is shown that under the laws of Norway the Norwegian government is still liable, if any liability exists, to pay compensation by reason of a warranty given in connection with the sale of the vessel.

I filed a transcript with the clerk but am unable to pay the fees or to print said transcript and I desire to proceed in this cause under Section 837, Title 28, Judicial Code, and desire that the filing fees heretofore paid to the Circuit Court of Appeals be refunded to me as was ordered by the United States Supreme Court in the case of Bainbridge v. Merchants and Miners Transport- Co., 77 L. Ed. 217, 1933 A. M. C. 32; I desire to have typewritten transcripts and brief made; that my occupation is that of a seaman and I would still be going to sea except for the disabling injuries that I sustained.

(Signed) Peter Van Der Weyde.

Subscribed and sworn to before me this 14th day of July, 1933.

(Signed) Wm. P. Lord, Notary Public for Oregon.
Commission Expires Feb. 17, 1937.

[File endorsement omitted.]

[fol. 71] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Leave to Appellant to Prosecute Appeal Under 28 USCA 837—Aug. 21, 1933

Ordered motion of appellant to prosecute appeal without prepayment of costs, in accordance with 28 U. S. C. A. 837, granted.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Ordered appeal in above cause submitted on brief on file on behalf of appellant, and argued by Mr. Lane Summers, proctor for appellee, and submitted to the court for consideration and decision.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE—NOV. 19, 1934

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7192—Nov. 19, 1934

PETER VAN DER WEYDE, Appellant

vs.

OCEAN TRANSPORT COMPANY, LTD., a Corporation, Claimant of the Steamship "Taigen Maru", Her Tackle, Apparel, Engines, Boilers and Furniture, and C. Stang Anderson, Appellees.

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Before: Wilbur, Sawtelle and Garrecht, Circuit Judges.

OPINION FILED—Nov. 19, 1934

SAWTELLE, Circuit Judge:

On April 18, 1931, appellant herein filed this libel in rem against the steamship "Taigen Maru", her tackle,

etc., based upon a claim for personal injuries alleged to have been suffered by him on May 16, 1922, while aboard the respondent vessel on the high seas. The appellant at the time of his alleged injuries was a subject of Her Majesty the Queen of the Netherlands and a member of the crew, under Norwegian articles signed by him at Astoria, upon the respondent vessel (then the S. S. "Luise Nielsen") of Norwegian nationality and under the ownership of B. Stolt Nielsen & Company, Inc., a corporation of the Kingdom of Norway.

C. Stang Anderson, Acting Consul of Norway, at Seattle, was allowed to intervene and file exceptive allegations in which he protested against the court taking jurisdiction on the ground that it was a dispute between a member of the crew of a Norwegian vessel and the master and owners of said vessel and according to the ship's articles and [fol. 75] the applicable law of Norway was a dispute to be decided by the Norwegian Consul subject to appeal to the courts of Norway.

The District Court entered an order dismissing the libel which reads in part as follows:

"* * * The court having given consideration to the protest against jurisdiction being entertained in the above entitled cause, and libelant's response thereto, and having concluded that, in the exercise of its discretion, the court should not hear said cause upon the merits:

"Now Therefore, it is hereby ordered:

"(1) That said cause be, and the same hereby is dismissed; * * *".

A former libel was filed in the District Court of the United States for the District of Oregon on September 15, 1922, against the S. S. "Luise Nielsen" based upon the same cause of action set forth in the libel in the case at bar. The Vice Consul of Norway at Portland, Oregon, was permitted to intervene in that suit and file exceptive allegations in which he protested against the court taking jurisdiction on the same grounds urged in the present suit. Amended pleadings were thereafter filed and on June 2, 1924, the District Court entered an order dismissing the libel in accordance with the prayer of the Vice Consul of Norway.

Between the time the first libel was dismissed by the

District Court of the United States for the District of Oregon and the time the present libel was filed, the owner of the S. S. "Luise Nielsen" sold that steamship to a Japanese company and her name has been changed to S. S. "Taigen Maru." However, the former Norwegian owner in making the sale to the present Japanese owner obligated itself to deliver said steamship "free from all debts and incumbrances" as a result of which obligation the former Norwegian owner is interested in the adjudication of any claims against said vessel in accordance with the Norwegian law in effect at the time such claim accrued. For this reason, C. Stang Anderson, Acting Consul of Norway, claims to be officially concerned.

On this appeal appellee argues, apparently for the first time, that the decree of the lower court dismissing the libel should be affirmed because the court was without jurisdiction to entertain the suit, and that it is not a case in which the District Court has even discretionary power to [fol. 76] entertain the suit. It is well established that the question of jurisdiction of the trial court may be raised at any time and is not waived by failure to raise the issue in the trial court and even in the absence of the question being raised by the parties, it is the duty of the appellate court to determine both its own jurisdiction and the jurisdiction of the trial court. M. C. & L. Ry. v. Swan, 111 U. S. 379; C. B. & Q. Ry. Co. v. Willard, 220 U. S. 413; B. & O. R. Co. v. City of Parkersburg, 268 U. S. 35; Nixon v. Michaels, 38 F. (2d) 420. Cyclopedia of Fed. Proc., Vol. 6, §2689.

All courts, state and national, must take judicial notice of and be governed by a treaty to which the United States is a party as a law of the land. U. S. v. Rauscher, 119 U. S. 407; Munich Reinsurance Co. v. First Reinsurance Co. of Hartford, 6 F. (2d) 742; Daigle v. U. S., 237 Fed. 159; Lacroix Fils v. Sarrazin, 15 Fed. 489. See also, U. S. v. Reid, #7476, decided by this court October 15, 1934. At the time the alleged injuries were sustained by libelant, the Treaty of Commerce and Navigation, 1827, between the United States and the Kingdom of Sweden and Norway was in force and effect. The second paragraph of Article XIII of said treaty is as follows:

"The Consuls, Vice-Consuls, or Commercial Agents, or the persons duly authorized to supply their places, shall

have the right as such to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country; or the said Consuls, Vice-Consuls, or Commercial Agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood, that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country." (8 Stat. 346, 352.)

"In the absence of treaty stipulations, the courts of admiralty of the United States have jurisdiction of all matters appertaining to a foreign ship while in the ports of the United States." Heredia v. Davies, 12 F. (2d) 500, 501, and cases cited. In suits between foreigners it is dis-
[fol. 77] cretionary with the court as to whether or not it will assume jurisdiction. Canada Malting Co., Ltd. v. Paterson Steamships, Ltd., 285 U. S. 413, 421.

Where treaty stipulations exist, however, with regard to the right of the Consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land and must be fairly and faithfully observed. The Belgenland, 114 U. S. 355, 364, 5 S. Ct. 860; Wildenhus's Case, 120 U. S. 1, 17, 7 S. Ct. 385.

In The Rindjani, Adam v. Griep, 254 Fed. 913, this court considered a similar case involving the treaty stipulations between the United States and the Netherlands. In that case the members of the crew were claiming transportation from San Francisco to Rotterdam based upon their claim that the voyage to San Francisco constituted a clear breach of the contract of shipment which entitled them to discharge at the latter city. After setting out the treaty provisions, this court stated:

"The provisions of article 11 of the convention, above set out, are in effect the same as those of article 10 of the treaty between the United States and the King of Prussia of May 1, 1828 (8 Stat. 382), which was the subject of con-

sideration in The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. No. 4,426, in which case it was held that that treaty required that the matter then in dispute—a matter of wages in that case—was one for the determination of the consular officer, and that the United States courts had no jurisdiction of it.

"That ruling was followed by Judge Deady in the case of The Marie (D. C.) 49 Fed. 286, in the case of The Burchard (D. C.) 42 Fed. 608, in the Welhaven (D. C.) 55 Fed. 80, and in other cases there cited.

"Our conclusion is that the court below had no jurisdiction over the question as to the right of the libelants to transportation from San Francisco to Rotterdam, * * *".

In The Elwine Kreplin, 9 Blatchf. 438, Fed. Cas. 4426, relied on by this court in The Rindjani, supra, the treaty stipulation between the United States and the King of Prussia was identical in terms with the treaty stipulation now under consideration. In The Marie, 49 Fed. 286, a case involving the same treaty stipulation now under consideration, Judge Deady stated:

"The treaty of 1827 is a law of that kingdom, and by it the consuls of that country are given exclusive jurisdiction [fol. 78] of all 'differences'—controversies—between the captain and crew of a Norwegian vessel. This, in effect, forbids—disables—the libelant from resorting to any other tribunal for the settlement of such 'difference'. The treaty is also a law of the United States, and forbids this court from interfering in a case of a 'difference' between the master and crew of a Norwegian vessel".

The same conclusion was reached in The Welhaven, 55 Fed. 80. See also, The Ester, 190 Fed. 216, 221.

The Burchard, 42 Fed. 608, involved a dispute between the master and a member of the crew of a German vessel and there, too, the court held that it was without jurisdiction of the suit in view of the treaty of December 11, 1871, with the German Empire. The same conclusion was reached in The Cambitsis, 14 F. (2d) 236, where the dispute was between the master and a member of the crew of a Greek vessel. The provisions of the treaties with the German Empire and with Greece, in this connection, were substantially the same as those contained in the treaty of 1827 with Norway.

In The Eir, Persson v. Folsen, 60 F. (2d) 124, cited by appellant, the Circuit Court of Appeals for the Fourth Circuit held in a suit brought by a Swedish seaman against a Norwegian steamship for injuries sustained while working on board as a member of her crew in a United States port that it was an abuse of discretion for the District Court to decline to take jurisdiction. The jurisdiction of the District Court in view of the treaty between the United States and Norway was not challenged and both parties, as well as the court, apparently assumed that it was a matter within the discretion of the District Court.

The authorities we have cited lead us to the conclusion that the District Court was without jurisdiction to entertain the suit and the libel should have been dismissed for that reason rather than as an exercise of discretion.

In view of our conclusion that the District Court lacked jurisdiction of the suit, it becomes unnecessary to consider other points argued in the briefs.

Decree of the District Court dismissing the libel is affirmed, with costs to the appellee.

[File endorsement omitted.]

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7192

PETER VAN DER WEYDE, Appellant,

vs.

OCEAN TRANSPORT COMPANY, LTD., a Corporation, Claimant of the Steamship "Taigen Maru," Her Tackle, Apparel, Engines, Boilers and Furniture, and C. Stang Anderson, Appellees.

DECREE—Filed Nov. 19, 1934

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the Transcript of Record from the District Court of the United States for

the Western District of Washington, Southern Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellees, and against the appellant.

It is further ordered, adjudged, and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 80] Clerk's Certificate of foregoing transcript omitted in printing.

Endorsed on cover: Seamen's Case. File No. 39,348. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 720. Peter Van Der Weyde, Petitioner, vs. Ocean Transport Company, Ltd., a Corporation, Claimant of the Steamship "Taigen Maru," etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed February 19, 1935. File No. 720, O. T., 1934.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 18, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the application to this controversy of the Treaty of Commerce and Navigation of July 4, 1827, between the United States and the Kingdom of Sweden and Norway.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FEB 19 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 720

PETER VAN DER WEYDE,

Petitioner,

vs.

THE STEAMSHIP "TAIGEN MARU," HER TACKLE, APPAREL, ENGINES, BOILERS AND FURNITURE, AND OCEAN TRANSPORT COMPANY, LTD., A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

JOHN P. HANNON,
WM. P. LORD,
T. WALTER GILLARD,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 720

PETER VAN DER WEYDE,

Petitioner,

vs.

THE STEAMSHIP "TAIGEN MARU," HER TACKLE, APPAREL, ENGINES, BOILERS AND FURNITURE, AND OCEAN TRANSPORT COMPANY, LTD., A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Supreme Court of the United States:

The petitioner, Peter Van der Weyde, relying upon Title 28, Section 347, U. S. C. A. (Sec. 240 of the Judicial Code) to sustain the jurisdiction of this Court, respectfully shows as follows:

On the 17th of March, 1922, petitioner was employed at Astoria, Oregon, as a seaman on the *S. S. Luise Nielsen,* for a round-trip voyage between the Columbia River and the Orient, to be discharged at the Port of Portland. The vessel was registered under the laws of Norway, and the

master and commanding officers of the vessel came from Norway, but the able and ordinary seamen were employed in Portland and Astoria to make this round-trip voyage. The vessel was owned by B. Stolt Nielsen & Company of Haugesund, Norway, and at the time was under charter to an Oregon corporation.

On the 16th of May, 1922, while the vessel was about six days out from the Columbia River, the libelant was seriously injured by falling through an unguarded hatch. It is claimed that his injuries were occasioned by negligence.

On the 15th of September, 1922, petitioner filed suit in the District Court for Oregon, libeling the vessel. The Norwegian Consul filed a protest against the court taking jurisdiction on the grounds that the controversy involved a controverted claim between a citizen of The Netherlands and a vessel owned by a Norwegian corporation, and on the 9th of April, 1924, the court allowed the intervention and dismissed the libel on June 2, 1924.

At the time of the hearing of the intervention the Norwegian Consul, who was an attorney of the Federal Court in Portland, personally appeared and assured the court that the laws of Norway provided a scheme of Workmen's Compensation insurance for seamen injured on vessels belonging to Norway, and that Van der Weyde would be paid a compensation in accordance with the provisions of such act, and that already the sum of $1,800 had been paid on account of medical treatment, and assured the court that compensation would be paid Van der Weyde. Thereupon the court entered a decree dismissing the libel.

The vessel was thereafter sold by the owners to the claimant herein, Ocean Transport Company, Ltd., and was renamed the *Taigen Maru,* and she has been without the jurisdiction of the State of Oregon, where petitioner resides, and who is a resident alien.

On the 26th of January, 1933, this vessel was berthed at Longview, Washington, and the vessel was libeled in the District Court of that district upon the cause of suit herein referred to. Thereafter, C. Stang Anderson, Acting Consul of the Kingdom of Norway, resident at Seattle, petitioned the court for leave to intervene for the purpose of filing exceptive allegations directed to the libel. It was shown by these exceptive allegations that in making sale of the vessel, the Norwegian owner had warranted the vessel against liens, and it was obvious that the vessel was released upon a bond being furnished either by the Norwegian government, acting through its Consul, or by the former owners.

The former owners had no general agent in Oregon, or in the United States at the time the petitioner was injured, or subsequently, upon whom service of process in a suit in *personam* could be had.

Van der Weyde filed a response to the exceptive allegations of the intervenor wherein he showed to the court that he was a resident alien, and had been a resident of the United States since 1900, and had followed the vocation of a seaman on vessels of American registry. He alleged his employment as a seaman on the *Luise Nielsen*, and the fact that he was permanently and totally disabled as the result of the injuries sustained on the vessel. He also set forth the representations to the court of the Norwegian Consul in relation to the payment to him of compensation, and that had he been able to secure this compensation he would have been able to have lived in comparative comfort. He further alleged that after the dismissal of the intervention proceedings and remanding of the proceedings against the ship to the Norwegian Consul, he from time to time called upon the Norwegian Consul and requested payment of compensation, and that the Norwegian Consul informed him that the "money was lying in Norway" under a Norwegian insurance act, and the same would be received shortly.

On the 11th of June, 1929, petitioner addressed the Minister from The Netherlands at Washington, D. C., and requested him to make a demand upon the Kingdom of Norway to pay petitioner the compensation. The Netherlands minister replied that the owners had done everything that could be claimed on the ground of the Treaty of March 7, 1911, between The Netherlands and Norway concerning maritime accidents and indemnifications. In other words, because Van der Weyde was not a resident of The Netherlands he was unable to procure his country to compel the payment of compensation.

Petitioner also showed that the entire liability was covered by a policy of insurance with a marine insurance company known as Assuranceforeningen Skuld of Oslo, Norway, and that neither the present nor former owner was required to pay the liability in event a decree awarding damages was made by the court.

Petitioner then prayed that the district court hear the cause and assess damages under the general principles of the maritime laws of the United States relating to seamen, if the court should be so advised after hearing of the testimony, or if the court were of the opinion that the benefits of the Workmen's Compensation Act of Norway should be paid petitioner, the court should compel the intervenor to give assurances for the payment of compensation. It was also shown by the response that the parties were not prejudiced by the loss of witnesses, inasmuch as there were three witnesses to the accident who resided in Portland.

On the 28th day of June, 1933, the court entered an order reciting the appearances of the parties and proctors, and stating "having concluded that in the exercise of its discretion the court should not hear said cause upon the merits," and dismissed the cause.

The case was then appealed to the United States Circuit Court of Appeals, and on the 19th day of November, 1934,

the Court delivered an opinion. The Court found that in suits between foreigners it was discretionary for the Court to assume jurisdiction, and also that a treaty between the United States and Norway of 1827 prevented the Court from taking jurisdiction, and affirmed the order dismissing the libel.

Reasons Relied On for the Issuance of the Writ.

The question presented is one of admiralty jurisdiction involving important questions that have frequently arisen and will arise in the future regarding the rights of seamen shipping on foreign vesels under charter to American shipping companies, and there is no authoritative decision by this Court defining what these rights may be.

There is conflict of authorities as to whether or not it is an abuse of discretion for the court to recognize the protests of a foreign consul and refuse to retain jurisdiction of the cause and try the case on the merits. The decisions of the different Circuit Courts are not in accord as to whether or not it is an abuse of discretion to refuse jurisdiction in such cases as presented by the facts in this case. This is illustrated in the case of *The Eir* (C. C. A.), 60 F. (2d) 124, and the decision in this case. The Fourth Circuit and the Ninth Circuit are in direct conflict upon this point. In the case of *The Eir*, Persson, a Swedish seaman, signed on as a member of the crew of the *Eir*, a Norwegian vessel, at Mobile, and while the vessel was lying at Hampton Roads he was injured as the result of which he libeled the vessel in the District Court at Norfolk. It was moved, as in this case, that the trial court decline to take jurisdiction and a hearing was had upon this question. Testimony was taken and the vice consul of Norway at Norfolk filed a protest against the court taking jurisdiction on the ground that the controversy lay between a Swedish seaman and a Norwegian ship, and that by the Norwegian law a seaman

may not receive damages for personal injuries from a ship but is entitled to share in an insurance fund provided by the Norwegian Government and maintained at the expense of ship owners for the purpose of providing compensation to injured seamen.

As in this case, the trial court declined to take jurisdiction and dismissed the libel and an appeal was taken. In a *per curiam* opinion the order of the trial court was reversed and the district court was directed to take jurisdiction of the suit, and the Court of Appeals held that there was a clear denial of justice for the reason that libelant's only remedy was an appeal to the authorities and courts of Norway.

It should not be lost sight of that it was clearly shown by the record that Van der Weyde has been without a remedy for a long period of time, and that it is impossible for him to secure justice by any appeal to the authorities in Norway, or to go to Norway to litigate his claim.

Another reason why this Court should take jurisdiction is to decide an important question arising under a treaty, and whether or not the provisions of this treaty have not been abrogated by the adoption of the Seamen's Act.

We shall not attempt in this petition to set forth all of the important questions which have arisen in this case, and rest our reasons for asking the Writ upon the general proposition that there is a direct conflict between the decisions of the different Court of Appeals on an important question arising under the maritime law, and on the evident proposition that the petitioner has been denied justice in the courts on the theory that either the court has a right to exercise discretionary jurisdiction, or upon the theory that a treaty, to which his country is not a party, bars his rights. It should not be lost sight of that the reason for the action of Norway was because there was not a reciprocal compensation agreement between the United States and

Norway, and this was the basic reason for declining payment of compensation by Norway.

Because of this difference in authorities, and the necessity for settling for the whole country this important question of jurisdiction, petitioner respectfully prays that this Court will issue a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify to the record in this cause for review and decision by this Court of the question involved, and your petitioner will ever pray.

JOHN P. HANNON,
Yeon Bldg., Portland, Oregon,
WM. P. LORD,
Spalding Bldg., Portland, Oregon,
T. WALTER GILLARD,
Spalding Bldg., Portland, Oregon,
Proctors for Petitioner.

Dated this 11th day of February, 1935.

I, John P. Hannon, hereby certify that the foregoing petition is in my opinion well founded in law, and not interposed for delay.

JOHN P. HANNON.

FILE COPY

JUN 19 1935

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 4

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION.

JOHN P. HANNON,
WM. P. LORD,
T. WALTER GILLARD,
ANDREW G. HALEY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 4

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION.

Statement.

A review is asked in this case because of the irreconcilable conflict involving an important question of maritime law, between the several circuit courts and the Circuit Court of Appeals for the Ninth Circuit. Two recent decisions are in hopeless conflict and both involve a determination of the identical question.

This case involves the right of a seaman, under signed articles on a vessel chartered to an American corporation, for voyages between the Columbia River, the Orient and return. Outside of the master and commanding officers, the vessel was manned by a picked-up crew secured in Portland under articles to be discharged in Pacific Coast ports. The owner had no statutory agent in the United States.

The Circuit Court of Appeals for the Ninth Circuit dismissed the case for want of jurisdiction. It held that treaty provisions between Norway and the United States deprived the court of jurisdiction. (*Van der Weyde* v. *Ocean Transport Co.*, 73 F. (2d) 922.)

In the case of *The Eir* (*Persson* v. *Falsen*), 60 F. (2d) 124, the Circuit Court of Appeals for the Fourth Circuit held exactly to the contrary, and assumed jurisdiction on account of the manifest injustices of relegating a seaman, under such circumstances, to the foreign courts.

Believing that the Circuit Court of Appeals for the Ninth Circuit was wrong, we have asked for a review of this question. The question also becomes important because the question is frequently arising and will frequently arise in the future. A review of the cases will show that the bar is far from being satisfied with the application of the rule by the trial courts.

Bearing in mind that there is a conflict in the decisions on an important point, we will state the facts of this case with a view of showing that a manifest injustice has been done and accomplished by attempting to apply too strictly the "law of the flag", and too great an accentuation of a supposed inviolability of vessels to local laws while within territorial waters.

On the 17th of March, 1922, libelant was employed as a seaman on the S. S. Luise Nielsen for a round trip voyage between the Columbia River and the Orient, to be dis-

charged at the Port of Portland. The vessel at that time was chartered to an Oregon corporation known as the Asiatic-American Steamship Company, but under the terms of the charter the registry of the vessel remained under the laws of Norway and the crew were in the employ and pay of the owners. Master and commanding officers of the vessel came from Norway, but able and ordinary seamen were employed in Portland and Astoria. The vessel was owned by B. Stolt Nielson & Company, of Haugesund, Norway.

On the 16th of May, 1922, libelant had been sick several days as a result of poor rations served the crew, and he was forced to work by the master while sick, and met with certain personal injuries due to the failure to properly light the vessel, his enfeebled condition, by walking into an open and unguarded hatch, without any lifeline placed around it. This accident happened on the high seas on the return voyage and about six days out from the Columbia River.

On the 15th of September, 1922, libelant filed suit in the United States District Court for Oregon, libeling the Luise Nielsen. After the libel was filed the Norwegian consul at Portland filed a protest against the court taking jurisdiction on the grounds that the controversy involved a controverted claim between a citizen of Holland and a vessel owned by a Norwegian corporation, and on the 9th day of April, 1924, there was entered an order by the court granting the petition for intervention by the Norwegian consul, and at the same time the intervention was allowed. The claim being at issue the court dismissed the libel on June 2, 1924. The Norwegian consul, who was an attorney of the Federal Court in Portland, personally appeared and assured the court that the laws of Norway provided for an express compulsory workmen's compensation insurance as to seamen injured on vessels belonging to Norway, and

advised the court that there had been paid approximately $1,800 on account of medical treatment and hospitalization, and stated to the court that compensation would be paid Van der Weyde. Thereupon the court entered a decree dismissing the libel. No appeal was taken from this dismissal.

The vessel was thereafter sold by the owners to the claimant herein, Ocean Transport Co., Ltd., and was renamed the Taigen Maru.

On the 26th day of January, 1933, this vessel was berthed at Longview, Washington, and the vessel was libeled in the United States District Court for the Western District of Washington, Southern Division, upon the same cause of suit referred to above. Thereafter, C. Stang Anderson, acting consul of the Kingdom of Norway, resident at Seattle, petitioned the court for leave to intervene for the purpose of filing exceptions and exceptive allegations directed to the libel. Paragraph X of the exceptive allegations contains the following:

X.

"That despite the fact that said steamship, formerly the 'Luise Nielsen', now the 'Taigen Maru', is now a Japanese vessel, and no longer a Norwegian vessel, your petitioner as Norwegian consul is nevertheless officially concerned, by virtue of the fact that in making sale of said steamship to the present Japanese owner thereof, the former Norwegian owner, B. Stolt Nielsen & Company, Inc., obligated itself to deliver said steamship 'free from all debts and encumbrances', as a result of which obligation such former Norwegian owner is interested in the adjudication of any claims against said vessel, in accordance with the rights and obligations arising from the Norwegian law effective at the time such claim accrued."

The exceptive allegations contain other matters which we do not believe are material to the presentation of our statement of the controversy, such as excerpts from the Norwegian law, Articles of Seamanship between Van der Weyde and the master of the steamship, reference to the Norwegian Seamen's compensation act, and reference to the formed suit, to which reference has already been made, by way of a plea of *res judicata* and *laches*.

Van der Weyde filed a response to the exceptions of the claimant, which contained the following allegations:

I.

"Libelant admits each and every allegation contained in Paragraph I thereof, except libelant denies that the decree referred to in said paragraph is a final decree, completely determining and adjudicating the rights and obligations of said libelant and of said steamship Luise Nielsen, arising out of all causes of action stated by or involved in said Amended Libel, and further alleges that during the hearing of said intervention, the said Norwegian consul, acting for and on behalf of the owners and for and on behalf of his government, promised the said R. S. Bean, the judge presiding, that he would see that the compensation according to the laws of Norway would be paid libelant, and for this reason the decree dismissing said suit was entered, and said suit was never heard, and further alleges that the said proceedings were not tried upon the merits as to whether or not said steamship was seaworthy, and libelant had a cause of suit to recover damages for his said personal injuries according to the course of the general maritime law as administered by the courts of the United States."

A separate response was filed to the exceptive allegations of the Norwegian consul. In this response it was alleged that Van der Weyde was born in The Netherlands and

deserted vessel in the United States in 1907, and has ever since been a resident alien of the United States, and has followed the vocation of a seaman on vessels of American registry. He then set up his employment as a seaman under the agreement referred to, and that he met with a certain injury, and that at the time of the hearing on the protest of the Norwegian consul in Portland against the court taking jurisdiction, it was well known that he was totally and permanently disabled. This response also contains the following averments:

"IV.

"That at the time of the trial of said suit, when the said Norwegian consul at Portland did claim in open court that under the laws of the Kingdom of Norway libelant was entitled to receive and be paid a compensation, which laws are similar in import to the compensation laws now adopted by many states, and did state that said Peter Van der Weyde would be paid said compensation, and that R. S. Bean, the judge trying said proceedings, did thereupon refuse to take jurisdiction of the proceedings against said S. S. Luise Nielsen to recover damages for the personal injuries sustained by said Peter Van der Weyde, as alleged in his libel; that at said time libelant was still disabled and suffered great physical pain, and it was libelant's intention to return to his mother's home in The Netherlands, where libelant would be able to live in comparative comfort on the compensation which would be paid him under the said Norwegian laws; that time expired and libelant called upon said Norwegian consul and requested the said Norwegian consul to pay said compensation; that said Norwegian consul informed libelant that said 'money was lying in Norway' under a Norwegian insurance act; that every few months thereafter libelant did call at the office of said consul to inquire whether said compensation had been received, and time kept passing without the payment of said compensation, or

the exhibition of any written instructions by said Norwegian consul regarding the compensation payable to libelant; that thereupon on the 11th day of January, 1929, libelant wrote the Minister from The Netherlands as follows:

'January 11, 1929.

'The Minister from The Netherlands,
Washington, D. C.

'SIR:

'At the request of Peter Van der Weyde, a citizen of Holland, residing in the United States, we are submitting to you for such action as may be appropriate the question of securing him money on account of personal injuries sustained while employed as a sailor on the S. S. 'Luise Nielsen'. The facts are that Mr. Van der Weyde shipped on a round trip voyage from Portland, Oregon, to the Orient and return. The vessel was flying the Norwegian flag but had been chartered to the Asiatic American Steamship Company, an Oregon corporation. The charter did not change the ownership to that of *pro hac vice* of the Oregon company, so the vessel still remained a Norwegian vessel.

'On the 16th day of April, 1922, Mr. Van der Weyde met with an accident by falling through a hatchway which had been left open and was unlighted. The accident resulted in a fracture of the right femur, injuries to the back and head, and without going into detail as to the extent of the injuries, we may say that his injuries are so permanent and disabling that he never again will be able to resume heavy employment. There is some light work which he might possibly be able to do.

'Believing that the case would be governed by the principles of American maritime law, inasmuch as the employment was made in the United States and contemplated a round trip voyage, etc., a libel was filed against the vessel with a view of securing an indemnity for the injuries done. There was no legal defense to this action because the negligence was so flagrant,

but the court on the motion of the attorneys for the Steamship Company, dismissed the suit on the theory that the 'law of the flag' controlled and bound the rights of the seamen on the ship, and under the laws of Norway no lien was given against the ship in such cases, but that these laws provided a compensation in the form of monthly payments.

'It was loudly proclaimed in court that the company had expended vast sums of money in endeavoring to effect a cure of the injured seaman, and that they desired to make payments of compensation in accordance with the laws of Norway, and it was upon this suggestion that the court took the view that he would not apply the American maritime law to the case, inasmuch as a fixed compensation was already provided, and he would not therefore exercise his discretionary right and refused to apply the law of the United States.

'Repeated demands were made by the local consul for The Netherlands upon the Norwegian consul to pay this compensation, but it has never been paid.

'We are writing with a view that you take such official action as may be necessary to secure the payment of this compensation. Further information will be gladly furnished if required.

'Respectfully yours,

LORD & MOULTON,
By WM. P. LORD.'

"Libelant received the following answer to the above letter:

'Royal Netherland Legation

Washington, D. C., 9 February, 1929.

'SIRS:

'In answer to your letter of January 11, 1929, I have the honor to inform you that the Norwegian Steamship Company, B. Stoltz Nielson & Company, of Haugesund, has done everything that can be claimed by Peter Van der Weyde on ground of the treaty of March 7, 1911,

between The Netherlands and Norway concerning maritime accidents and indemnification. Further, the convention of January 9, 1925, between said countries is not applicable in this case as Van der Weyde does not reside either in The Netherlands or in Norway.

'Yours very truly,

J. H. VAN ROYES,
Netherland Minister.'

V.

"That thereafter libelant continued to request the payment of said compensation, but said compensation has never been paid; that in the meantime, as alleged in the libel, said steamship was sold, but libelant is informed and believes and therefore alleges it to be true, that said steamship was sold by the owners with a warranty to said owners against all claims for damages of every nature and description incurred prior to said sale, and the terms of said sale provided that the purchasers of said steamship would be indemnified against any and all loss on account of any claims being made by any person prior to said sale, and that the vendors would defend any and all such suits, and said steamship was protected by a P. and I. policy with the Assuranceforeningen Skuld of Oslo, Norway, by the terms of which the former owners were insured against loss by reason of the making of any claim, and said policy was in full force and effect at the time libelant was injured, and at the time said vessel was sold; that libelant's said cause was not tried on the merits as to the charge whether said vessel was unseaworthy, and was tried only upon the intervention of the said Norwegian consul at Portland, Oregon.

VI.

"That said vessel, to libelant's knowledge, has not been within the District of Oregon for a long time prior to the filing of the libel herein; that libelant would have again libeled said vessel if said vessel had been within the jurisdiction of a court within a reasonable

distance of where libelant resided, except for the fact that libelant believed that he would be paid the compensation as alleged.

VII.

"That libelant believes and therefore alleges it to be true that the present owners of said steamship are not interested in the result of libelant's claim, but on the contrary the defense of this claim is being made by the Assuranceforeningen Skuld of Oslo, Norway; that due to the fact that jurisdiction of the court in said proceedings was discretionary, libelant prays that his rights be determined and ascertained, that is to say: that this Court proceed and assess damages under the general principles of the maritime laws of the United States relating to seamen, if the court should be so advised after the hearing of the testimony herein, or if the court be of the opinion that the benefits of the Workmen's Compensaton Act should be paid libelant, the court should compel the intervenor to arrange for the payment of said compensation. Libelant further avers that the parties hereto are not prejudiced by the loss of witnesses, inasmuch as there are two witnesses to said accident, viz., Wm. Butnek, who resides in Portland, Oregon, and Jack Vanderwerf, who resides near Scappoose, Oregon, both actual witnesses to said accident."

The matter came on for hearing before Hon. Edward R. Cushman, District Judge, on the exceptions and exceptive allegations, and responses referred to, and on the 28th day of January, 1933, the court entered the following order:

"Order

"The above entitled cause having duly and regularly come on for hearing upon January 9 and 23d, 1933, before the above entitled court, the undersigned judge presiding, upon the exceptive allegations of the Intervenor, C. Stang Anderson, as Consul of the Kingdom of Norway, and upon the exceptive allegations of the

claimant, Ocean Transport Co., Ltd., upon the latter date Libelant appearing by his proctor, Wm. P. Lord, and orally responding to such exceptive allegations, and having been allowed further time in which to reduce to writing and file such responses and such having been done, and the court having given consideration to the consular protest against jurisdiction being entertained in the above entitled cause, and libelant's response thereto, and having concluded that, in the exercise of its discretion the court should not hear said cause upon the merits,

"Now, therefore, it is hereby ordered:

1. That said cause be and the same hereby is dismissed.

2. That the release bond and the stipulations for costs, filed by said claimant and said intervenor, be and they are hereby discharged, and the sureties thereon exonerated.

3. That said intervenor and said claimant have and recover from libelant lawful costs hereinafter to be taxed.

Done this 28th day of January, 1933.

EDWARD E. CUSHMAN,
Judge."

We wish to call attention to the fact that the real party in interest in this proceeding is a Norwegian insurance company, and to the fact that the witnesses to this accident still reside in and about Portland.

An appeal was taken to the Circuit Court of Appeals on the 19th of November, 1934, an opinion was filed wherein the court held that the district court lacked jurisdiction of the suit by reason of certain provisions of the Treaty of Commerce and Navigation between the United States and the kingdoms of Norway and Sweden, providing that consuls shall have the right, as such, to sit as judges in differences which arise between the captain and crews of vessels,

without interference of the local authorities. The court then cited a number of decisions sustaining the rule that the courts of the United States have no right to take cognizance of controversies arising between the master and members of the crew. In commenting upon the case of *The Eir*, 60 F. (2d) 124, relied upon by libelant in this case, holding that it was an abuse of the discretion of a trial judge to refuse to assume jurisdiction in a case where a Swedish seaman brought suit against a Norwegian steamship for injury while working on board as a member of her crew in a United States port, the Circuit Court of Appeals said that the court had overlooked the effect of the treaty provisions. We believe that the writer of the opinion in the *Van der Weyde* case failed to recognize and apply the rule that courts will assume jurisdiction in suits between foreigners where the refusal will work manifest injustice to one of the parties.

Assignment of Errors.

Now comes the above named libelant herein and says that in the record and proceedings in the above entitled cause there is manifest error and said libelant now makes, files and presents the following assignment of errors upon which he will rely.

I.

The court erred in dismissing said cause.

II.

The court erred in holding that jurisdiction between the libelant and the intervenor, C. Stang Anderson, as consul of the Kingdom of Norway, was a discretionary jurisdiction in the court.

III.

The court erred in entertaining the exceptive allegations and in not requiring the claimant and respondent and intervenor to answer.

Wherefore libelant prays that the decree herein be reversed and that the court try this cause *de novo* in this Court and award libelant such damages as he has sustained by reason of the wrongful acts complained about in the libel.

Points and Authorities.

I.

It was an abuse of discretion for the District Court to recognize the protest of the Norwegian consul and refuse to retain jurisdiction of the cause and try the case on the merits.

The Eir, 60 F. (2d) 124, 1932 A. M. C. 1042.
Canada Malting Co. Ltd., v. *Paterson Steamships, Ltd.,* 285 U. S. 413, 1932 A. M. C. 512.
The Apurimac, 1926 A. M. C. 703, 12 F. (2d) 500.
The Tricolor, 1933 A. M. C. 919.

II.

The decree of the District Court of Oregon is not a bar to the maintenance of this suit for the reason that jurisdiction was refused upon a promise made to the court by the Norwegian consul that libelant would be paid compensation under the Norwegian Seamen's Compensation Act. This promise is analogous to securing judgment of the court upon promise of compromise which was not performed, and the decree is therefore subject to be set aside under such precedents as

Freeman on Judgments, 5th Ed., Sec. 1214, p. 2523.
Freeman on Judgments, 5th Ed., Sec., 1243, p. 2587.
Chicago, R. I., etc., v. *Callicothe,* 267 F. 799.
U. S. v. *Throckmorton,* 98 U. S. 61.

III.

The particular circumstances of this case estop the claimant from asserting the defense of laches.

The Fulton, 54 F. (2d) 467.

Griffith v. *Seaboard Midland Petroleum Co.*, 1933 A. M. C. 911.

ARGUMENT.

I.

Discretionary Jurisdiction.

The trial court refused to take jurisdiction upon consideration of the consular protest and found that it should not hear the cause on the merits. No other question was considered by the court, but an express finding is made by the court that it would not exercise its discretion in retaining jurisdiction. There undoubtedly are many cases holding that a court of admiralty will not hear controversies between foreigners where the rights of the parties can be as readily administered by the law and courts of their own country. It has been a custom for consuls to enter a protest in cases where claims arise between resident aliens and the country which they represent. Such proceedings are an easy means of blocking litigation. In reference to seamen's claims there are many decisions of American courts holding that the court would leave controversies between seamen and the owners of foreign vessels to be determined by the consular agent or the courts of the vessel's nationality. Although the courts have always been careful in the statement of the rule to limit refusal to take jurisdiction wherein there would be a clear denial of justice to the seaman.

Judge Bean undoubtedly felt that there would be no denial of justice to Van der Weyde by the Kingdom of Nor-

way. It was shown in court that the Norwegian government had incurred approximately $2,000 expenses in treating Van de Weyde's injuries while in the hospital, which in itself showed good faith on the part of the Norwegian authorities, and undoubtedly the court thought, as many lawyers have learned from experience, that the payment of a monthly compensation to Van der Weyde, in view of his disabling injury, would be better for his interest than the payment of a lump sum of money which would be soon dissipated, and it was therefore not a denial of justice to Van der Weyde that the court refused to exercise jurisdiction on his claim for an indemnity against the vessel, but quite on the contrary the ends of justice would be served by remanding Van der Weyde's claim to the consul to carry out his promise that compensation would be paid Van der Weyde under the Norwegian compensation act.

The responsive allegations to the intervention of the Norwegian consul at Seattle show that the Norwegian consul stated in open court at Portland that Van der Weyde would be paid compensation and that at the time libelant was disabled and it was his intention to return to his mother's home in The Netherlands where he could live in comparative comfort on the compensation which would be paid him under the Norwegian law.

The time passed on and Van der Weyde called upon the Norwegian consul and requested payment of compensation and he was informed that the money was lying in Norway under a Norwegian insurance act and every few months afterwards Van der Weyde called at the office of the consul and inquired whether his compensation had been received. Eventually, on the 11th of January, 1929, Van der Weyde appealed to the Minister from The Netherlands at Washington, requesting his assistance in securing the payment

of the compensation which had been promised in open court, and the reply of the Minister under date of February 9, 1929, shows that The Netherlands Minister was not much concerned over the injustice done his fellow countryman by another government. Libelant continued to press the local consul for payment of his compensation until the filing of the libel against the Taigen Maru, when the Norwegian consul again appears and makes the same protests.

On these facts we believe that Judge Cushman abused his discretion in refusing to assume jurisdiction of the cause on the merits. We recognized that there is a long list of authorities opposed to these views. The case of *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 1932 A. M. C. 512, treats on this subject and reiterates the rule that the exercise of the discretion to retain jurisdiction will not be disturbed unless abused. The case arose out of the collision of two vessels, both of Canadian registry, which occurred in American waters. There was an advantage to be secured in respect to the assessment of damages against the vessel at fault under American maritime law which did not exist under the Canadian law. Jurisdiction was contested on the ground that the suit was wholly between foreigners. The District Court declined jurisdiction and dismissed the libel and appeal was taken to the Circuit Court of Appeals which affirmed the order of dismissal, and the Supreme Court allowed a review. It was contended that the District Court had abused its discretion in declining jurisdiction, since the cause of action arose within the territorial limits of the United States, and it was sought to apply certain statements in *The Belgenland*, 114 U. S. 355, to create an exception to the rule. The Court held there was no abuse of discretion in refusing to exercise jurisdiction, observing that if the libelants were entitled

to have the law of Canada applied, "the Canadian courts will, it must be assumed, give effect to it." In the course of the opinion the Court uses the following language;

> "The suggestion drawn from the language in *Belgenland, supra*, that such discretion exists only 'in cases arising beyond the territorial jurisdiction of the country to which the courts belong,' is without support in either the earlier or the later decisions of this Court. Nor is it justified by the language relied on, when that language is read in its context."

A most careful consideration of this principle of law is made and a careful selection of authorities is given in a carefully prepared note.

The case of *The Eir* (*Carl Persson* v. *Falsen*), C. C. A. 60 F. (2d) 124, 1932 A. M. C. 1043, is a case in point, and it was held that the court should retain jurisdiction under identical circumstances. The facts were as follows: Persson, a Swedish seaman, signed on as a member of the crew of the Eir, a Norwegian vessel, at Mobile, and while the vessel was lying at Hampton Roads he and other members of the crew were engaged in chipping the furnace when a bit of matter lodged in his eye, as a result of which he libeled the vessel in the District Court for the Eastern District of Virginia, at Norfolk. It was moved that the trial court decline to take jurisdiction and a hearing was had upon this question. Testimony was taken and the vice-consul of Norway at Norfolk filed a protest against the court taking jurisdiction on the ground that the controversy lay between a Swedish seaman and a Norwegian ship, and that by the Norwegian law a seaman may not receive damages for personal injuries from a ship, but is entitled to share in an insurance fund provided by the Norwegian government and maintained at the expense of ship owners for the purpose of providing compensation to injured seamen. The trial

court declined to take jurisdiction and dismissed the libel and an appeal was brought to the Circuit Court of Appeals for the Fourth Circuit. In a *per curiam* opinion before Judges Parker, Northcott and Soper, the order of the trial court was reversed and the District Court was directed to take jurisdiction of the suit and proceed to a determination of the issues involved.

Although, as the statement of facts, discloses, jurisdiction was refused in the first instance on the same ground as Judge Bean refused it, namely, that the libelant would be paid insurance from a compulsory insurance fund, the only difference between Van der Weyde's claim for the exercise of jurisdiction, and Persson's claim, is one of nationality of the seamen. The Court of Appeals held that the refusal to take jurisdiction was a "clear denial of justice" for the reason that libelant's only remedy was an appeal to the authorities and courts of Norway.

In the case of *The Tricolor,* 1933 A. M. C. 919, while the Circuit Court of Appeals sustained the refusal of the trial court to assume jurisdiction, the court made an observation which we think is applicable here (L. Hand, Chief Justice):

> "Both sides concede that had the Dutch shipper itself moved in the suit; jurisdiction would have depended upon the discretion of the court; each party would have been an alien, and the district court is not obliged to try such cases; its jurisdiction depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all."

The refusal of the court to retain jurisdiction was an abuse of its discretion. The record clearly shows that the Norwegian consul in Portland either never took any action looking towards the payment of monthly compensation, or if he did, he was unable to secure the payment of the com-

pensation from the Norwegian authorities having control over the fund, and instead of informing Van der Weyde of the true situation, he kept leading him on to believe that sooner or later the money would be paid him—it was "lying in Norway" for him. Consequently, with these facts before it, unless there were some other compelling reasons the trial court should have retained jurisdiction of this case, and proceeded to adjudicate the cause on its merits.

II.

The Seamen's Act Abrogates Treaty Provisions.

Libelant signed on this vessel in an American port for a voyage between the Columbia River and the Orient, to be discharged at Pacific Coast ports. The charter of the vessel to the American Asiatic Steamship Company will appear of record in these proceedings. It is to be noted that this company is an Oregon corporation, and purports to be engaged in shipping. The Luise Nielsen was chartered for certain voyages, all between the Pacific Coast and the Orient and return, so that the practical effect of the charter is to make the vessel, for all intents and purposes, an instrument of commerce between the United States and foreign countries, and the so-called rule of the "law of the flag" becomes a mere figure of speech so far as any materiality to this case. Signing on members of the crew at Pacific Coast ports to be discharged at Pacific Coast ports and the vessel carrying commodities fabricated in the United States, should be legally held to confer jurisdiction on our courts in cases of rights growing out of the conduct of the voyage. Assuming that the vessel was unseaworthy when she left the Columbia River and part of her cargo was lost or destroyed, would our courts be deprived of jurisdiction on account of the fact that the vessel flew a foreign flag and was navigated by a resident of Norway and a few of the commanding officers

of the vessel were also Norwegian citizens? Of course, in such a case, the court would inherently have jurisdiction. Why should there be any distinction between the rights of the crew who signed on in a port of the United States to be discharged in a port of the United States, who are injured owing to the unseaworthiness of the vessel, as is shown in this case? Fundamentally, there is no difference in the two cases. The Circuit Court of Appeals, referring to the treaty, held that the treaty provisions abrogated any right of members of the crew to make a claim in the courts of that state, although their voyage was completed in the United States.

Many trial courts have given too much deference to the claims of alien vessels to release themselves from liability in the territorial waters of the United States and the application of the so-called "law of the flag" has been the source of preventing many a seaman from securing redress for his wrongs, and I think it fair to say that this Court has held that the treaty provisions referred to have been abrogated by the adoption of the Seamen's Act.

I am referring to the case of *Strathearn Steampship Co.* v. *Dillon,* 252 U. S. 348, 350. In that case the question involved was whether seamen on foreign vessels in American ports were entitled to receive one-half pay of the wages earned before the voyages were ended, notwithstanding contractural obligations to the contrary, and it was held that the provisions of the Seamen's Act were applicable. The Court reached a conclusion in that case that the jurisdiction of the United States over foreign merchant vessels in our ports was such as to enable Congress to make provision that foreign vessels in our ports should be governed by the same rule. The Court went on to say that it was for this Government to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the ship-

ment of sailors in our own ports, and make them applicable to foreign as well as to domestic vessels. In conclusion this Court said:

> "Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports, and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States."

III.

The next question before the Court is one relating to the plea of *res judicata:* that is, whether the judgment in the former suit, where the District Court dismissed the suit on a protest of the Norwegian consul, can be successfully pleaded in bar to this suit.

In the first place, it should be noted in the response to the exceptions of the Ocean Transport Company, Ltd., claimant, that during the hearing on the intervention before Judge Bean the Norwegian consul promised Judge Bean that he would see that compensation according to the laws of Norway would be paid libelant, and it was for this reason that Judge Bean dismissed the libel. In the response to the exceptive allegations of Anderson, the acting consul of Norway at Seattle, the same claim is made. So we have here a promise that a monthly compensation under the Norwegian insurance would be paid Van der Weyde. These allegations go to show that the trial court denied jurisdiction on a promise which has not been subsequently fulfilled, viz., the payment of compensation, and which the trial court had every reason to believe would be paid by the previous conduct of the Norwegian authorities in paying Van der Weyde's medical and hospital care.

Courts have long held that a judgment secured under false promise of a compromise would be set aside, and we

believe that the promise made to Judge Bean by the consul during the proceeding on intervention is analogous to securing a judgment by a false promise of compromise, and consequently whatever force there may be to a court decree recognizing the protest of a consul, the decree can be successfully attacked for the usual grounds that decrees may be attacked.

Freeman on Judgments, 5th Ed., Sec. 1214, page 2523, states a salutary rule as follows:

> "But it is, of course, true that the judgment from which relief is sought does not operate as *res judicata* as to the matters adjudicated by it where a party has been prevented from presenting his case by fraud, mistake or other matters affording ground for equitable relief."

Again in Section 1243, page 2587, the author comments upon agreements between parties in relation to pending litigation, and the courts have uniformly set aside judgments thus obtained. The rule is stated thus:

> "It has frequently happened that one of the parties litigant has failed to present his claim or defense because he relied upon some agreement or understanding between himself and his adversary which, if observed, rendered such presentation unnecessary. And with more than occasional frequency, if we may judge from reports, these agreements have been designed to lull a party into security and inactivity in order that some unconscionable advantage could be taken of him. In all such cases, courts of equity, when asked to do so, have invariably restored the injured party to his rights, under the agreement, and have wrested from his opponent all those fruits he had hoped to harvest and enjoy through fraud and duplicity. 'The cases are full and explicit upon the point; a judgment obtained in violation of an agreement of compromise, and by which an appearance is prevented, will not be allowed to stand'."

In the case of *Chicago, R. I. & P. R. Co.* v. *Callicothe,* C. C. A., 267 F. 799, the plaintiff obtained a judgment in the State courts of Missouri for damages against a railroad company, and the case was appealed to the Supreme Court and application was made for writ of error *coram nobis,* etc., all of which were still pending when the railroad company filed suit in equity in the Federal Court to enjoin the enforcement of the judgment and to set aside the judgment obtained. It was alleged that the injuries alleged to have been received by the plaintiff were simulated, that he, aided by co-conspirators, feigned paralysis of his lower limbs and produced an apparent paralysis of his lower limbs and that the paralysis could not be detected by the usual medical tests, although such tests were made, and that plaintiff testified falsely that the paralysis was genuine and the result of injury, that plaintiff kept himself secreted in his house, and that the railroad company, by reason of the acts of the conspirators, was unable to determine the falsity of his claims until after the recovery of the judgment. The Court of Appeals held that a sufficient showing had been made to justify the court in restraining the execution of the judgment.

Reference is made to the leading case of *U. S.* v. *Throckmorton,* 98 U. S. 61, and practically all subsequent decisions, both in Federal and State courts are cited and discussed in the opinion. The rule quoted is recognized by this Court in *Nelson* v. *Meehan,* C. C. A., 155 F. 1, but it was held that the facts did not justify the application of the rule.

In the *Throckmorton* case, *supra,* the Supreme Court announces the rule as follows:

> "But there is an admitted exception to this general rule, in cases where, by reason of something done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from

exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. (Citing cases.)

"In all these cases and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

While we know of no precedent that decisions upon consular protests become *res judicata,* it seems very doubtful whether this doctrine should be applied in a case where the suit is discretionary as to whether the court will retain jurisdiction upon the merits.

IV.

Laches.

This defense is urged, but if the basis of a claim is well founded, then the respondents are estopped to assert the defense, unless the Ocean Transport Co., Ltd. could be said to be an innocent purchaser for value. It is the undisputed fact in this case that the Luise Nielsen was sold to her present Japanese owners with a warranty of title, and the record herein discloses that the vessel is insured against

this loss by a Norwegian insurance company, and that this company is the real party in interest in making the defense. Consequently the parties are not different in this proceeding and the court has obtained jurisdiction to render a judgment against the vessel, which will undoubtedly be paid if the claim is one of merit, by those who have been paid a premium to pay it. The protest of the Norwegian consul shows that the vessel was sold under a warranty of title and that the owners were bound to indemnify the purchasers against this claim, and it was for this reason that an appearance was made in the case. It was the conduct of the Norwegian authorities, undoubtedly acting at the instance of the owners, which prevented the assertion of this claim before the vessel was sold. Furthermore, there is nothing shown in the respondent's pleadings which would justify the conclusion that respondent is any worse off by reason of the delay. In fact, it is shown by libelant that practically all of the eye witnesses to the accident are still living in the Northwest and can be reached by process of court.

The defense of *laches* should, of course, be taken by answer and not by exception, but unless the respondent can show that it was materially prejudiced, it is not entitled to assert the defense of *laches* in admiralty.

In the case of *The Fulton,* C. C. A. 54 F. (2d) 467, there was a ten year delay before a case was disposed of—four years having expired after the accident before a suit was brought, and one witness had died, and the court held that this should not defeat the claim, but imposed penalty that the prevailing party should not be paid interest.

The case of *Griffith* v. *Seaboard Midland Petroleum Co.,* not yet officially reported, 1933 A. M. C. 911, is much in point. The libel was not filed until four and one-half years after the accident. A libel was prepared shortly after the

accident, but an office boy neglected to file it. A multitude of adverse circumstances against the assertion of the claim appear in the record, such as the death of the doctor who examined the libelant, death of members of the crew, insolvency of the insurer, and the sinking of the vessel, but the court held that the claim was not barred by *laches* under the particular facts of the case.

So in this case, there is nothing in the record tending to show that the real party in interest is any worse off than it would otherwise have been. We believe that in view of what has here been said, on the whole record as made, Judge Cushman's refusal to retain jurisdiction of the case was a denial of justice to the libelant and should be corrected by this Court in a decree directed to the District Court to proceed to the trial of the case on the merits

Respectfully submitted,

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ANDREW G. HALEY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 4

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PETITIONER.

ANDREW G. HALEY,
WM. P. LORD,
JOHN P. HANNON,
T. WALTER GILLARD,
Counsel for Petitioner.

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Respondent.

BRIEF OF PETITIONER ON THE QUESTION.

Statement.

A requested writ of certiorari was granted by this court on November 18, 1935, limiting the question to be considered to the application of this controversy to the Treaty of Commerce and Navigation of July 4, 1827, between the United States and the Kingdom of Sweden and Norway. For the sake of brevity the court is referred for a statement of the case to the petitioner's *brief in support of petition* (pp. 1-12, inclusive). The respondent filed no brief in connection with the petition for writ of certiorari, but has recently submitted a brief on the merits.

Argument.

Article XIII of the Treaty Between the United States and the Kingdom of Norway and Sweden was Abrogated on July 1, 1916. Several Years Before This Cause of Action Arose.

A few weeks after the Seaman's Act of March 4, 1915[1] became law, the Secretary of State sent a circular to Minister O'Rear (May 29, 1915) which read in part as follows:

> "SIR: By direction of the President, I enclose herewith a copy of an act of Congress of the United States, approved March 4, 1915, entitled 'An Act To Promote the Welfare of American Seamen in the Merchant Marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea.'
>
> "It is deemed appropriate that an explanation be made of the origin of the legislation * * * many events occurred immediately prior to the present legislation which have profoundly influenced and moulded public sentiment * * * as to the necessity for the protection of seamen in their natural rights as a class of laborers, theretofore discriminated against in comparison with the treatment accorded by law to all other classes of workmen. * * * It is * * * clearly shown by Article XVI of the Act that the intent of Congress was not to disturb the great and valuable treaties now existing between the Government of the United States and other countries, negotiated from time to time with so much care and with so much patience, but by appropriate legislation to correct and regulate the long-existing and varying methods of procedure in matters affecting seamen. That such methods of procedure and standards of conduct towards seamen generally have not advanced, as should have been the case, coincident with the treatment of other classes of labor is believed to be so well estab-

lished as to need no comment, and the President feels, therefore, that, when all the facts and circumstances attendant upon the passage of the Act and of the purposes actuating the Congress in its passage are fully considered by the other Governments whose treaties may be affected in parts, no serious difficulties will be found to exist to delay or to prevent an agreement for the mere abrogation or omission of the respective articles found to be inconsistent with the provisions of the Act. * * * an exchange of notes will be regular and effective because of the authority already granted to the President by Section XVI of the Act to abrogate the portions of the treaties inconsistent therewith. Hence, it will be perceived that the intent of Congress may be fully realized by informal agreements between the Government of the United States and other powers, and that in this way the various important treaties now subsisting may remain in full force and effect, with the exception of the articles relating to seamen * * * I am (etc.) W. J. Bryan."

This circular was transmitted the same *mutatis mutandis*, to the American missions in Austria-Hungary, Belgium, Brazil, China, Colombia, Denmark, France, Greece, Italy, Netherlands, Norway, Roumania, Spain and Sweden.[2]

Pursuant to these instructions and in conformity with Section XVI of the Act, the Norwegian Government was notified of the abrogation of Articles XIII and XIV. A lengthy correspondence ensued which finally culminated in the receipt of a note dated April 9, 1919 from the Norwegian Minister. A copy of this note (certified by the Department of State) is annexed hereto and by reference made a part hereof. For convenience it is quoted:

"Washington, April 9, 1919.

My Dear Mr. Acting Secretary of State:

In your note of February 27, 1919, relating to the exchange of notes between your Department and myself

of February 1, 1919, you have called my attention to the fact that in withdrawing the denunciation of the Treaty of July 4, 1827, except as to Articles XIII and XIV, the Government of the United States understands so far as the laws of the United States are concerned that these articles terminated on July 1, 1916. You presume that this is also the view of the Norwegian Government.

In reply to your said note I have the pleasure to inform you that I have been authorized by my Government to state to you that the Norwegian Government agrees to consider Articles XIII and XIV of the Treaty to have been terminated on July 1, 1916, in accordance with the Notification which the United States Minister at Christiania addressed to the Norwegian Government on June 24, 1915. I am (etc.). H. BRYN." (1 Foreign Relations, 1919, pp. 53 and 54; House Document No. 813, 66th Cong. 2d Session, pp. 53 and 54).

Thus Article XIII became a non-enity. It was abrogated and annihilated. No logic nor ratiocination can revive it so that in any manner it will have any application to this controversy. It was abrogated by the mutual consent of the high contracting parties. There was a meeting of the minds. The rights of the Norwegian Consuls in this country were limited and confined to the scope of the *jus gentium* in so far as that law is not in conflict with the statutes of our country or the decisions of our courts. As shown in the initial circular of the Secretary of State, America had accomplished another benefit for an oppressed class of laborers. The Treaty of 1827 minus the abrogated Articles XIII and XIV remained in effect until the ratification of the Treaty of Friendship, Commerce and Consular Rights between the United States and Norway on September 13, 1932.

The respondent contends that the abrogation of Article XIII by the State Department was *ultravires*. The peti-

tioner maintains that this is a striking instance of action on the part of the State Department which was predicated on an express mandate of Congress. However, there is no provision of the Constitution or of the law which prohibits the President from abrogating a treaty or a portion thereof.

The Convention between the United States and Mexico to prevent smuggling and for certain other objects was signed December 23, 1925, ratified March 11, 1926, and proclaimed March 18, 1926. It went into effect so far as the United States was concerned upon March 28, 1926. By its terms the Convention was to remain in force for one year, upon the expiration of which period, if no notice of a desire to terminate it had been given by either party, it was to continue in force until thirty days after either party should give notice of termination. Upon due consideration the State Department concluded to terminate the treaty at the expiration of the year, and accordingly gave the appropriate notice to the Government of Mexico. This was done without authority of Congress. President Taft without authority of Congress or of the Senate gave notice of the termination of the Treaty of 1832 between Russia and the United States (Public Relations of U. S., 1911, pp. 695 et seq.). There are many other instances of termination of treaties by the Executive.

The Norwegian Consul (who interposed the exceptive allegations) was under no misapprehension concerning his rights. He followed the procedure approved by the Law of Nations and did not presume to enter the controversy under Article XIII or any other treaty provision.

Oetjen v. *Central Leather Company,* 246 U. S. 297, 62 Law Ed. 726-732:

> "The conduct of the foreign relations of our government is committed by the Constitution to the executive

> and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. *United States* v. *Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *Foster* v. *Nielson*, 2 Pet. 253, 307, 309, 7 L. Ed. 415, 433, 434; *Garcia* v. *Lee*, 12 Pet. 511, 517, 520, 9 L. Ed. 1176, 1178, 1179; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420, 10 L. Ed. 226, 228; *Re Cooper*, 143 U. S. 472, 499, 36 L. Ed. 232, 240, 12 Sup. Ct. Rep. 453.''.

It is patent that the court below was not advised by counsel of the abrogation of Article XIII of the treaty. On the one hand it quotes the defunct Article XIII and many cases adjudicated under similar Articles in other treaties all of which were also abrogated, and on the other hand it makes no mention of the Seaman's Act. Because of the contention that the treaty stipulation was still in force and effect the disabled seaman Van Der Weyde was deprived of his right of recourse to the courts of the United States. The Circuit Court quotes with approval from *Heredia* v. *Davies* (C. C. A.-4), 12 F. (2d) 500, the following language:

> ''In the absence of treaty stipulation, the courts of admiralty of the United States have jurisdiction of all matters appertaining to a foreign ship while in the ports of this country. *The Belgenland*, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; *The Roxen* (C. C. A. 4th), 11 F. (2d) 55, decided January 14, 1926; *Elder Dempster Shipping Co.* v. *Pouppirt* (C. C. A. 4th), 125 F. 732, 60 C. C. A. 2d), 255 F. 846, 167 C. C. A. 174; *The Ester* (D. C.), 190 F. 216.''

Here is a case in which a seaman, resident of the United States for many years (being a citizen of the Netherlands) shipped on a Norwegian vessel under charter to an Oregon corporation. He suffered actionable injuries. The Norwegian Consul time after time promised proper relief but it was not forthcoming. He appealed to the Minister from

his own country, but here too he was informed that relief was not to be had. We know of no case of a similar nature in the history of American jurisprudence where relief was denied to an applicant before the bar of an American court. On the other hand, there are several instances where a lower court dismissed such causes in a mistaken impression that its jurisdiction was discretionary, whereas in fact the higher courts held that to dismiss the cause was an abuse of discretion. Such is the rule of law as is shown by the following cases:

> *The Belgenland,* 114 U. S. 355, 368-69: "This seems to us to be a very sound view of the subject; and acting on this principle, we certainly see nothing in the course taken by the District Court in assuming jurisdiction of the present case, which calls for animadversion. Indeed, where the parties are not only foreigners, but belong to different nations, and the injury or salvage service takes place on the high seas, there seems to be no good reason why the party injured, or doing the service, should ever be denied justice in our courts. Neither party has any peculiar claim to be judged by the municipal law of his own country, since the case is preeminently one *communis juris,* and can generally be more impartially and satisfactorily adjudicated by the court of a third nation having jurisdiction of the *res* or parties, than it could be by the courts of either of the nations to which the litigants belong. As Judge Deady very justly said, in a case before him in the district of Oregon: 'The parties cannot be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is the court of admiralty within the reach of whose process they may both be found.' *Bernhard* v. *Greene,* 3 Sawyer 230, 235."

> *The Eir, Persson* v. *Falsen,* 60 Fed. (2d) 55; 125: "Here the seaman's only adequate remedy was the action he brought in the court of the United States,

and he would be denied this relief if required to resort to the courts or officials of far distant Norway. * * * It seems to us that to deny jurisdiction of this cause was error".

Elman v. *Moller*, 11 Fed. (2d) 55; 57: "We think, however, that the court below erred in declining jurisdiction in his case. Even a foreign ship cannot, when in an American port, forcibly compel one of its crew, albeit an alien, to serve against his will. If he alleges that such attempt has been made, we believe that an American court is bound to hear his complaint and give him such redress, if any, as he may show he should have. * * * The courts should act promptly and vigorously to vindicate all the rights of seamen, as well those recently conferred on them, as those which date from time immemorial. We doubt not that even now they will often need all the protection that can be given them."

The Sounderborg, (Atkies Dampskibsselskabet Dounebrog et al. v. Mikkelson et al.), 47 Fed. (2d) 723 (C. C. A.-4) "It is contended on behalf of the appellants that, since this is a controversy with respect to wages between a foreign master and ship on the one hand, and foreign seamen on the other, this court should not take jurisdiction. The circumstances under which a federal court will take jurisdiction were discussed in The Roxen (D. C.) 7 F. (2d) 739 (affirmed by this court, Elman v. Moller, 11 F. (2d) 55), where it was held that jurisdiction should always be taken in any case in which the refusal would result in a denial of justice. On this point, as we see it, the judge, below in assuming jurisdiction correctly said: 'In this case, as has been pointed out, libelants were signed on in an American port for return, upon the expiration of the voyage, to an American port. They intended and intend to remain in the United States as long as they are undisturbed by the immigration authorities, and this, of course, depends upon their compliance with the acts of Congress with relation to foreign seamen. Not only, therefore,

would their contract entitle them to a discharge in the United States, but this in fact occurred. To hold, therefore, that their only remedy was by appeal to the courts of Denmark would be a clear denial of justice."

The Tricolor, 1933 A. M. C. 919: "Both sides concede that the Dutch shipper itself moved in the suit, jurisdiction would have depended upon the discretion of the court; each party would have been an alien, and the district court is not obliged to try such cases; its jurisdiction depends upon whether its exercise is essential to justice; whether the libelant is driven to seek it in order to secure any adequate redress at all".

Comment on Respondent's Brief.

Respondent states that the petitioner sets forth the contention of abrogation of the treaty by the Seaman's Act of 1915, in an "amosphere of * * * tacit concession without suggestion that the terms of "the treaty were not (sic), comprehensive enough to cover a claim of this character", and that "such a premise not entering a consideration of the jurisdictional question seems justified by the plain language in Article XIII of the Treaty of 1827 * * * ". The petitioner denies the implication of these statements. The plain fact is that Article XIII was abrogated by operation of an Act of Congress long before the cause of action arose, and the petitioner has heretofore recognized and asserted this to be a fact.[3]

The respondent then cites a long series of cases arising under Article XIII of the Treaty in question and under similar Articles contained in other treaties. The following cases cited have no place in a discussion of the merits of this cause (except as they support the view of petitioner) as the treaty law under which they were adjudicated has long since been abrogated:

Wildenus' case, 120 U. S. 1, 30 L. Ed. 565.[4]

The Rindjani, 254 Fed. 913 (C. C. A. 9).[5]

The Elwine Kreplin, Fed. Cas. 4426 (C. C.).[6]
The Buchard, Fed. 608 (D. C.).[7]
The Marie, 49 Fed. 286.[8]
The Wellhaven, 55 Fed. 80.[9]
The Bound Brook, 146 Fed. 160 (D. C.).[10]
The Ester, 190 Fed. 216.[11]
The Cambitsis, 14 F. (2d) 236.[12]

The respondent then launches into a learned and sincere effort to show that despite the abrogation of Article XIII by the mutual consent of this country and the Norwegian Government long before the cause of action arose, that nevertheless the Article still subsists in so far as this controversy is concerned. He uses the following logic:

The Seaman's Act did not expressly name the Articles of each treaty to be abrogated, the Seaman's Act was not inconsistent with all of the provisions of Article XIII: The State Department acted *ultravires* in abrogating the whole of Article XIII. The State Department is guilty of "a surprisingly loose and inexcusable construction of the Seaman's Act," and finally the respondent summarizes "In other words, if the action of the State Department (never ratified by the Senate) as to Article XIII was beyond the direction and intent of the Seaman's Act of 1915, such action was not only a misconstruction of that statute, but, in effect, an encroachment upon constitutional segregation of powers by the executive upon the legislative branch of government—most cancerous when least conspicuous."

Neither the underlying law nor the record of this patient diplomatic negotiation justifies the above intemperate quotations nor the points made by the respondent. The history and record of the enactment of the Seaman's Act shows that it was in no way sponsored by the State Department. However, when the Act became law, pursuant to the mandate of Congress and the directions of the Presi-

dent, the department proceeded to an orderly and skillful adjustment of existing treaties in conformity therewith. This long negotiation is one of the brightest stars in the diadem of American efforts on behalf of the oppressed and the afflicted.

Counsel devotes several pages of his brief to the subject of treaty making power and the abrogation of treaties.[13] In view of the facts involved in this case, his citation of authorities, where applicable at all to the issue, squarely support the view of the petitioner. He cites the following cases as showing that no decision would embarrass this Court in sustaining the ruling of the Circuit Court of Appeals for the Ninth Circuit:

Sandberg v. *McDonald*, 248 U. S. 184, 63 L. Ed. 200.

Neilson v. *Rhine Shipping Co.*, 248 U. S. 205, 63 L. Ed. 208.

Strathearn Steamship Co. v. *Dillon*, 252 U. S. 348, 64 L. Ed. 607.

Thompson v. *Lucas*, 252 U. S. 358, 64 L. Ed. 612.

Jackson v. *The Archimedes*, 275 U. S. 463, 72 L. Ed. 374.

Yet, an examination of the above cases shows that in each case the court took jurisdiction. In fact the *Strathearn* case is a classic example of why the State Department was forced to abrogate Article XIII in its entirety. That case required the court to consider Section 4 of the Seaman's Act (that Section amends paragraph 4530 U. S. revised statutes; Comp. Stat., paragraph 8322, 9 Fed. Stat. Anno., 2d Ed. Page 158). For the purpose of adjudicating certain claims the section expressly opens the courts of the United States to all seamen on foreign vessels while in the harbors of the United States. This provision of the Seaman's Act is directly in conflict with Article XIII, and there is no language in the Article whereby an exception

could be made to accommodate the statute. In other words, the statute simply vitiates the Article.[14]

We respectfully urge that a decree be entered directing the District Court to proceed to the trial of the case on the merits. It is true that the opinion of the Circuit Court did not raise the question of abuse of discretion by the District Court, and that the writ herein properly limited the appeal to the treaty question. But it is hoped that this Court, in rendering its opinion, will aid and guide the bar by discussing the merits of the cause (*Oetjen* v. *Central Leather Co.*, *supra*). This is particularly desired in view of the fact that The Eir (C. C. A. 4) *supra* is almost identical with this case as to the facts. (See pp. 17 and 18 of brief in support of petition.)

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Footnotes.

[1] 38 Stat. at L. 1164, Chap. 153, Comp. State. Para. 8306, 9 Fed. Stat. Anno. 2d Ed. p. 145.

[2] A complete list of the treaties (with the particular articles noted) affected follows:

Austria-Hungary, May 8, 1848. Article IV.
Austria-Hungary, July 11, 1879. Articles XI and XII.
Belgium, March 9, 1880. Articles XI and XII.
Bolivia, May 13, 1858. Article XXXIV.
Brazil, Dec. 12, 1828. Article XXXI.
China, June 18, 1858. Article XVIII.
Colombia, Dec. 12, 1846. Article XXXIII.
Colombia, May 4, 1850. Article III.
Denmark, July 11, 1861. Articles I and II.
France, June 24, 1822. Article VI.
France, Feb. 23, 1853. Article VIII and IX.
Great Britain, June 3, 1892. The entire treaty.
Greece, Nov. 19, 1902. Articles XII and XII.
Italy, May 8, 1878. Article XIII.
Italy, Feb. 24, 1881. The entire treaty.
Kongo, Jan. 24, 1891. Article V.
Netherlands, Jan. 19, 1839. Article III.
Netherlands, May 23, 1878. Articles XI and XII.
Norway, July 4, 1827. Articles XIII and XIV.
Roumania, June 17, 1881. Articles XI and XII.
Spain, July 3, 1902. Articles XXIII and XXIV.
Sweden, July 4, 1827. Articles XIII and XIV.
Sweden, June 1, 1910. Articles XI and XII.
Tonga, October 2, 1886. Article X.

[3] Brief in Support of Petition, pp. 19-21.

[4] The treaty stipulation upon which this case was adjudicated was Article XI of the Convention between the United States and Belgium of March 9, 1880. This Article was abrogated in the same negotiation as was Article XIII of the Treaty of July 4, 1827, between the United States and the Kingdom of Norway and Sweden. For the sake of brevity, each footnote hereafter will merely show the pertinent abrogated article which formed the basis of adjudication in the cases cited.

[5] Treaty with the Netherlands of May 23, 1878, Article XI.

[6] Treaty with Prussia of 1828 (war time abrogation).

[7] Treaty with Germany of 1871 (war time abrogation).

[8] Treaty with the Kingdom of Norway and Sweden of 1827, Article XIII.

[9] Id.

[10] Treaty with Germany of 1871 (war time abrogation).

[11] Treaty with the Kingdom of Norway and Sweden of 1827, Article XIII.

[12] Treaty with Greece on November 19, 1902, Articles XII and XIII (this case was apparently decided without the court being apprized of the abrogation of the pertinent articles).

[13] Brief of respondent, pp. 37-44.

[14] For a further discussion of this case, see brief in support of petition pp. 20 and 21.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. [redacted] 4

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., a corporation, Claimant of the Steamship "Taigen Maru," etc.

Respondent.

Respondent's Motion for Order to Print Complete Transcript of Record and Supporting Affidavit

---

LANE SUMMERS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 720

PETER VAN DER WEYDE,

Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., a corporation, Claimant of the Steamship "Taigen Maru," etc.

Respondent.

Respondent's Motion for Order to Print Complete Transcript of Record and Supporting Affidavit

---

Comes now respondent, Ocean Transport Company, Ltd., a corporation, as claimant of the steamship "Taigen Maru," and moves for an order of this Court requiring and directing the printing of that portion of the typewritten transcript of record now on file with

the clerk of this Court (submitted to and considered by both lower Courts in the above entitled cause) never heretofore printed, as the result of inadvertent omission by the Clerk of the appellate court in originally failing to transmit the same to the Clerk of this Court with that portion of the transcript of record heretofore printed, pursuant to order of this Court, upon motion of petitioner as a seaman under United States Code Annotated, Title 28, Section 837.

This motion is based upon the full typewritten transcript of record filed with the Clerk of this Court, and upon supporting explanatory affidavit hereto attached as a part hereof.

LANE SUMMERS,
Proctor for Respondent.

Of Counsel:

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Seattle, Washington.

UNITED STATES OF AMERICA)
STATE OF WASHINGTON) ss.
COUNTY OF KING)

LANE SUMMERS, being first duly sworn, upon oath deposes and says:

That this affidavit is made in support of the foregoing motion.

That affiant is one of the proctors of record for the respondent Ocean Transport Company, Ltd., a Japanese corporation, claimant and owner of the steamship "Taigen Maru"; that affiant is familiar with the history of and the record in this cause.

That the pending cause is an admiralty proceeding in rem, instituted in the United States District Court for the Western District of Washington, Southern Division, by libel of petitioner, a subject of the Netherlands, against the Japanese steamship "Taigen Maru," to recover damages for personal injuries alleged to have been sustained on the high seas during employment aboard as a seaman in May, 1922.

I. That in skeleton outline the ultimate facts upon which respondent's motion is based are as follows:

(1) The transcript of record in this cause was not printed on appeal to the Circuit Court of Appeals—petitioner (appellant) being a sea-

man entitled to the benefits of U. S. C. A. Title 28, Section 837;

(2) The transcript of record in this cause included certified transcript of record in a former cause (litigated in the United States District Court for the District of Oregon) incorporated in this cause by reference and by stipulation as a part of respondent's exceptions to petitioner's libel, and likewise incorporated as a part of the Norwegian Consul's protest and exceptive allegations to said libel;

(3) The transcript of record in the former cause was an essential part of the contentions made by respondent and by the Norwegian Consul in defense against petitioner's libel;

(4) The transcript of record in the former cause was presented to both lower courts as a part of the record in this cause, and was considered by both lower courts in dismissing petitioner's libel;

(5) By inadvertent omission of the Clerk of the Circuit Court of Appeals for the Ninth Circuit the transcript of record in the former cause was not transmitted to the Clerk of this court as a part of the transcript of record in this cause;

(6) Because of such inadvertent omission the transcript of record in the former cause was not printed by the Clerk of this court pursuant to its order directing the printing of the transcript of record upon petitioner's application;

(7) The transcript of record in the former cause, duly certified, is now on file with the Clerk of this court available for printing;

(8) The transcript of record in the former cause is an essential basis for review of and right decision in this cause.

II. That in amplified statement, the facts upon which respondent's motion is based are as follows:

That petitioner first attempted to recover damages for said personal injuries by filing, in September, 1922, in the United States District Court for the District of Oregon, a libel in rem against the same steamship, then a Norwegian vessel named "Luise Nielsen." That after the seizure of said steamship under the usual admiralty process she was released by B. Stolt Nielsen & Company, Inc., a corporation of the Kingdom of Norway, as the then owner thereof, upon a release bond in the form of a stipulation.

That in April, 1924, following entry of order of court allowing intervention, the Norwegian Consul at Portland, Oregon, filed exceptive allegations to petitioner's libel, on the basis of which dismissal was sought as an exercise of the court's discretion, with permission for the adjustment of petitioner's claim by the Norwegian Consul in harmony with the laws of the Kingdom of Norway. That the Norwegian Consul's exceptive allegations alleged and showed:

(1) That the respondent vessel was of Norwegian nationality;

(2) That petitioner was a subject of the Netherlands;

(3) That under the general maritime law, being a member of the crew of a Norwegian vessel, signed under Norwegian articles, as concerned petitioner's rights and obligations, he was a Norwegian seaman;

(4) That by the Norwegian law an ill or injured seaman was to be entrusted to the Norwegian Consul for adjustment of claims and settlement of any dispute with the master or vessel;

(5) That articles signed by petitioner contained a provision that the interpretation of the rights and obligations under the contract were determinable by the Norwegian Consul and not by a foreign court;

(6) That since suffering injuries, petitioner had received hospital care at the expense of the Norwegian steamship owner and the Norwegian government.

That in May, 1924, the Norwegian steamship owner filed its answer to petitioner's libel in which, in addition to denials, it made affirmative allegations summarized as follows:

(1) That petitioner was a subject of the Netherlands;

(2) That the steamship was of Norwegian nationality;

(3) That the contract of hiring between the steamship and petitioner contained provision that "he shall serve on board the ship in the capacity of able seaman and ordinary seaman, with obligations and rights as stated in maritime law of the 20th of July, 1893. (Norwegian law)"; and that "any disagreement as to the interpretation of this contract shall be temporarily decided by the Norwegian Consul and not in a foreign country be brought in a foreign court;"

(4) That said quoted provisions of the Norwegian maritime law were applicable to the rights and obligations of petitioner and said steamship and its owner;

(5) That in addition to such provisions of the Norwegian maritime law, there was at the time of said injuries in force in Norway a Workmen's Compensation Act, known as the law of August 18, 1911, relating to the insurance of seaman against accidents, providing for compensation insurance from a state administered fund for injured Norwegian seamen, and for foreign seamen injured on Norwegian vessels, and providing that if an accident rendered it necessary to send an injured seaman to a hospital, the Royal Accident Insurance Office of Norway would make payment of the expense connected with the treatment and maintenance of such injured seaman, even

though a foreigner, without possessing or claiming any right to reimbursement from the owner of the ship upon which such injury occurred; and further providing in Section 32 of said law that "accidents coming within the scope of this law" (of which the accident to petitioner was one) "impose no obligation upon the owner, master or other officer of the ship concerned to pay personally, or out of ship's estate, any compensation, unless it has been proved by a penal sentence that one or the other of such persons has caused the injury through intent or through gross negligence";

(6) That said petitioner had theretofore received hospital care and been maintained at substantial expense.

That subsequently, in May, 1924, hearing was had before the District Court of Oregon, at which oral testimony and written depositions were received and considered upon issues presented by petitioner's libel, the exceptions thereto of the Norwegian Consul, and the answer thereto of the Norwegian steamship owner.

That in June, 1924, decree of the District Court of Oregon was entered, dismissing petitioner's libel with costs. That no appeal being taken or application for review being made to any appellate court, such decree became final.

That after a lapse of seven years following such decree, petitioner's second and present attempt to recover for the same personal injuries was made, by filing libel in rem in the above entitled cause in April, 1931, before the District Court for the Western District of Washington, against the same steamship (then the Japanese steamship "Taigen Maru"), after respondent Ocean Transport Company, Ltd., had become owner thereof.

That said steamship having previously been released under the usual bond, respondent as steamship owner, filed in December, 1932, exceptions to petitioner's libel in the present cause alleging and showing:

(1) The cause of action set forth in petitioner's first admiralty libel, filed in the District Court of Oregon;

(2) The claim to and release of the steamship upon bond filed by the Norwegian owner;

(3) The answer of such Norwegian owner to petitioner's libel;

(4) The depositions of witnesses filed in the former admiralty cause;

(5) The intervention of the Norwegian Consul in the former admiralty cause;

(6) The exceptive allegations of such Norwegian Consul;

(7) The amended libel of petitioner in the former admiralty cause;

(8) The answer of the Norwegian owner to petitioner's amended libel;

(9) The hearing before the District Court of Oregon;

(10) The final decree of that Court entered in June, 1924, dismissing petitioner's libel with costs;

(11) The fact of no appeal or review;

(12) The complete identity of petitioner, his cause of action, and the steamship, both in the former and in the present suits.

That also in December, 1932, intervention having been allowed by order of court, the Norwegian Consul at Seattle, Washington, filed exceptive allegations to petitioner's libel in the present cause, which exceptive allegations alleged and showed:

(1) That the steamship in May, 1922, was Norwegian in nationality and ownership;

(2) That petitioner was a subject of the Netherlands;

(3) That under the general maritime law, being a member of the crew of a Norwegian ship, employed under Norwegian articles, petitioner's rights and obligations as a seaman were determined by the Norwegian law;

(4) That according to the provisions of the Norwegian law disputes between a seaman and the vessel or its master were to be settled by the Norwegian Consul, and liability for illness or injury to the seaman rested upon the government treasury and not upon the owner of the vessel under the Seamen's Compensation Act of August 18, 1911 (Norwegian);

(5) That the articles signed by petitioner expressly agreed that the rights and obligations be determined by the Norwegian law, and that any dispute be decided by the Norwegian Consul and be not decided by any foreign court in any foreign country;

(6) That petitioner had received medical, nursing and hospital care in Astoria, Oregon, to the extent of approximately $2000 at the expense of the Norwegian owner and the Norwegian government;

(7) That the provisions of the Norwegian law and of the ship's articles, signed by petitioner, had been proved and established in the earlier litigation before the District Court of Oregon, as shown by the certi-

fied copy of the record transferred to the present cause on stipulation;

That in January, 1933, the District Court of Washington "concluded that in the exercise of its discretion the court should not hear said cause upon the merits" and dismissed petitioner's libel in the present cause with costs taxed against petitioner.

That the dismissal of petitioner's libel in this cause was appropriately predicated in part upon the proceedings in and the results of the former admiralty litigation, instituted by petitioner in the District Court of Oregon, which same were incorporated in and made a part of the exceptions of respondent to petitioner's libel, and the exceptive allegations of the Norwegian Consul to petitioner's libel by reference therein to the transcript of record from the District Court of Oregon. That such transcript of record, certified by the Clerk of the District Court of Oregon, was incorporated in and made a part of respondent's exceptions and the Norwegian Consul's exceptive allegations by stipulation with proctors for petitioner, filed in this cause in December, 1932.

That petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit in this cause, by notice filed in April, 1933. That in connection with such appeal order was obtained permitting petitioner to

prosecute the appeal as a seaman under the provisions of U. S. C. A. Title 28, Section 837.

That petitioner by the Circuit Court of Appeals was allowed to prosecute the appeal without printing any of the transcript of record, the appeal being determined solely upon typewritten apostles, of which respondent and affiant were furnished no copy.

That at the time application was made to this Court by petitioner for writ of certiorari there existed no printed apostles, the transcript of record being wholly in typewritten form, confined to the original on file with the Clerk of the appellate court.

That in connection with the petitioner's said application for writ of certiorari, by the inadvertence of the Clerk of the Crcuit Court of Appeals there was omitted from transmission to the Clerk of this Court a portion of the transcript of record, to-wit: the entire transcript of record from the District Court for the District of Oregon, certified by the Clerk thereof, which had been incorporated in and made a part of respondent's exceptions to petitioner's libel and the Norwegian Consul's exceptive allegations to petitioner's libel, upon which said exceptions and said exceptive allegations were predicated, and to which the District Court for the Western District of Washington, and the Circuit Court of Appeals gave con-

sideration in reaching their respective decisions dismissing petitioner's libel. That such transcript of record from the District Court of Oregon not having been received by the Clerk of this Court, the same was not included in the transcript of record as printed by the Clerk of this Court under its special order upon petitioner's application.

That upon receiving from the Clerk of this Court printed copy of transcript of record, affiant became advised of omission therefrom of the typewritten transcript of record in the former proceedings, certified by the Clerk of the District Court of Oregon. That on respondent's application, the Clerk of the Circuit Court of Appeals transmitted to the Clerk of this Court all of the transcript of record in the above entitled cause which same is now on file with the Clerk of this Court, duly certified and available for printing.

That when this cause was pending on appeal before the Circuit Court of Appeals, affirmance of the lower Court's decree of dismissal was urged by respondent's brief (pp. 20-25) upon contentions and authorities summarized and listed as follows:

> "1. Federal courts will not hear a cause on the merits in the absence of jurisdiction; and where a federal court has no jurisdiction over the subject matter, objection to jurisdiction may be

urged at any time in the trial court or in the appellate court; and even in the absence of objection, it is the duty of the court, on its own motion, to dismiss a case of which it has no jurisdiction.

1. Benedict on Admiralty, 5th Ed., Sec. 235;

Cutler v. Rae, 7 How. 730; 12 L. Ed. 890;

Mansfield, etc. Co. v. Swan, 111 U. S. 379; 28 L. Ed. 462;

Minnesota v. Northern Securities Co., 194 U. S. 48; 48 L. Ed. 870;

Chicago, etc. Co. v. Willard, 220 U. S. 413; 55 L. Ed. 521;

United States v. Mayer, 235 U. S. 55; 59 L. Ed. 129;

The Dredge Lisbon, 3 Fed. 2d 408 (C. C. A. 9);

The White Squall, Fed. Cas. 17570 (C. C.);

The Monte A., 12 Fed. 331 (D. C.);

The John C. Sweeney, 55 Fed. 540 (D. C.);

The Lindrup, 70 Fed. 718 (D. C.);

The Oceano, 148 Fed. 131 (D. C.);

The Washington, 296 Fed. 158 (D. C.);

The Amsadoc, 1923 A. M. C. 1017 (D. C.);

Crawford v. Ocean Carriers Co., 1924 A. M. C. 45 (D. C.).

"2. The Norwegian law, being the law of the ship's flag, applies to a claim of a Dutch seaman, employed under Norwegian articles, injured aboard a Norwegian vessel on the high seas; and, since under the Norwegian law no lien against the vessel exists, the court is without jurisdiction of the subject matter.

Crapo v. Kelly, 16 Wall. 610; 21 L. Ed. 430, 436;

Mali v. Keeper of Common Jail, 120 U. S. 1; 30 L. Ed. 565; 567;

In re Ross, 140 U. S. 453; 35 L. Ed. 581, 589;

United States v. Rodgers, 150 U. S. 249; 37 L. Ed. 1071, 1077;

Patterson v. The Endora, 190 U. S. 169; 47 L. Ed. 1002, 1007;

The Hamilton, 207 U. S. 398; 52 L. Ed. 264;

Grand Trunk Ry. Co. v. Wright, 21 Fed. (2d) 815 (C. C. A. 6);

The Falco, 20 Fed. (2d) 362 (C. C. A. 2);

U. S. S. B. v. Greenwald, 16 Fed. (2d) 951 (C. C. A. 2);

The Hanna Nielsen, 273 Fed. 171 (C. C. A. 2);

Rainey v. New York, etc. Co., 216 Fed. 449, 454 (C. C. A. 9);

Thompson etc. Ass'n v. McGregor, 207 Fed. 209 (C. C. A. 6);

The European, 120 Fed. 776, 780 (C. C. A. 5);

Navarino, 7 Fed. (2d) 743,744 (D. C.);

Wenzler v. The Robin Line Steamship Co., 277 Fed. 812 (D. C.);

The Cuzco. 225 Fed. 169, 175 (D. C.);

The Esther, 190 Fed. 216, 219 (D. C.);

The Belvidere, 90 Fed. 106 (D. C.);

The Welhaven, 55 Fed. 80 (D. C.);

The Marie, 49 Fed. 288 (D. C.);

The Egyptian Monarch, 36 Fed. 773, 774 (D. C.);

Wilson v. The John Ritson, 35 Fed. 663 (D. C.);

Resigno v. Jarka Co., 162 N. E. 13 (N. Y.);

Clark v. Montezuma, 1926 A. M. C. 594 (N. Y.).

"3. Even if a lien against the vessel did originally exist, nevertheless, no jurisdiction of the subject matter in this present cause was ever acquired by the lower court or by this court, because the respondent vessel was forever released from such lien by the bond or stipulation to abide and pay the decree filed in the former suit pending before the United States District Court at Portland.

Hughes on Admiralty, pp. 407, 408;

1 Corpus Juris, 1306;

1 Benedict on Admiralty, 5th Ed. Sec. 364;

United States v. Ames, 99 U. S. 35; 25 L. Ed. 295;

The Haytian Republic, 154 U. S. 118; 38 L. Ed. 930;

The Union, Fed. Cas. 14346 (C. C.);

The White Squall, Fed. Cas. 17570 (C. C.);

The Fred M. Lawrence, 94 Fed. 1017 (C. C. A. 2);

The I. F. Chapman, 241 Fed. 836 (C. C. A. 1);

The Susana, 2 Fed. (2d) 410, 412 (C. C. A. 4);

Gray v. Hopkins-Carter, etc. Co., 32 Fed (2d) 877 (C. C. A. 5);

United States v. Davidson, 50 Fed. (2d) 517 (C. C. A. 1);

The Old Concord, Fed. Cas. 10482 (D. C.);

The Josephine, Fed. Cas. 12663 (D. C.);

The Thales, Fed. Cas. 13855 (D. C.);

The Nahor, 9 Fed. 213 (D. C.);

The William F. McRae, 23 Fed. 557 (D. C.);

The Cleveland 98 Fed. 631 (D. C.);

Lamprecht, et al, v. Cleveland, etc. Co., 291 Fed. 876 (D. C.);

Re: John B. Rose Co., 254 Fed. 367 (D. C.);

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The Greyhound, 4 Fed. Sup. 184 (D. C.);

The Nightingale, 4 Fed. Sup. 494 (D. C.);

The Phantasy, 4 Fed. Sup. 920 (D. C.);

The Cayuga, 6 Fed. Sup. 280 (D. C.);

"4. Under the treaty between the Kingdom of Norway and the United States, the Norwegian Consuls are granted authority 'to sit as judges and arbitrators' to determine the claims of seamen against Norwegian vessels, and the admiralty courts of this country are bound, without exercise of discretion, to dismiss such suits in recognition of consular jurisdiction.

Treaty of Commerce and Navigation, 1827, between the United States and the Kingdom of Sweden and Norway—Article XIII, Vol. 2, Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776-1909, pp. 1748, 1775;

The Belgenland, 114 U. S. 355, 364; 29 L. Ed. 152, 155;

Heredia v. Davies, 12 Fed. (2d) 500, 501 (C. C. A. 4);

The Marie, 49 Fed. 286 (D. C.);

The Welhaven, 55 Fed. 80 (D. C.);

The Esther, 190 Fed. 216, 221;

The Sarpfos, 1924 A. M. C. 347 (D. C.);

The Cambitsis, 14 Fed. (2d) 236 (D. C.);

26 R. C. L. pp. 925, 926.

"5. Even in the absence of treaty granting consular authority, the exercise of jurisdiction by federal courts over admiralty suits involving a claim by a foreign seaman against a foreign vessel is discretionary; such jurisdiction will not be maintained over the protest of a foreign consul, except when, in the exercise of sound discretion, it is necessary to prevent actual injustice; and the refusal to maintain jurisdiction in a particular case will not be disturbed in the appellate court except for abuse of discretion by the trial court.

Ex Parte Newman, 81 U. S. 152, 168, 169; 20 L. Ed. 877, 880;

The Belgenland, 114 U. S. 355, 368; 29 L. Ed. 152, 157;

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The Knappingsborg, 26 Fed. (2d) 935 (D. C.);

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The Strathlorne, 1926 A. M. C. 1384 (D. C.);
The Thorgerd, 1926 A. M. C. 404 (D. C.);
The Bifrost, 8 Fed. (2d) 361 (D. C.);
The Koenigin Luise, 184 Fed. 170 (D. C.);
The Albani, 169 Fed. 220 (D. C.)."

That transcript of record in the former cause litigated before the District Court of Oregon was material to the ruling of the Circuit Court of Appeals, made in this cause on November 19, 1934 (R. 41-46) in acceptance of respondent's fourth contention, and is essential to an affirmace of the decrees of both lower courts dismissing petitioner's libel upon respondent's second, third and fifth contentions.

That, in conclusion, unless this Court requires and directs the Clerk thereof to supplement the transcript of record as now printed by adding thereto printed transcript of record in the former cause litigated before the District Court of Oregon, certified by its Clerk, now on file with the Clerk of this Court, it will be impossible for respondent, in conformity with the rules of this Court in respect to respondent's briefs, to fully present facts essential to a just and correct determination of this cause; and respondent will be deprived of the factual basis upon which to urge contentions which

should prompt this Court to deny petitioner's application for writ of certiorari, and which should cause, in the event of a hearing upon the merits, this Court to affirm both lower courts in their dismissal of petitioner's libel.

LANE SUMMERS,

Subscribed and sworn to before me
this 25th day of October, 1935.

FRED S. MERRITT,
Notary Public in and for the State
of Washington, residing at Seattle.
(Notarial Seal)

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 4

PETER VAN DER WEYDE, Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., Respondent

---

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

---

Brief of Respondent

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 4

PETER VAN DER WEYDE, Petitioner,

vs.

OCEAN TRANSPORT COMPANY, LTD., A CORPORATION, CLAIMANT OF THE STEAMSHIP "TAIGEN MARU", ETC., Respondent

---

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

---

Brief of Respondent

QUESTION FOR REVIEW

By this court writ of certiorari has been granted to the Circuit Court of Appeals for the Ninth Circuit—"limited to the question of the application to this controversy of the Treaty of Commerce and Navigation of July 4, 1827, between the United States and the Kingdom of Sweden and Norway (8 Stat. 346)."

TREATY INVOLVED

For convenient reference the portion of that Treaty vital to consideration is quoted:

> "Article XIII. Each of the high contracting parties grants to the other the privilege of appointing, in its commercial ports and places, consuls, vice consuls, and commercial agents, who shall enjoy the full protection and receive every assistance necessary for the due exercise of their functions; but it is expressly declared that in case of illegal or improper conduct with respect to the laws or Government of the country in which said consuls, vice consuls, or commercial agents shall reside, they may be prosecuted and punished conformably to the laws, and deprived of the exercise of their functions by the offended Government, which shall acquaint the other with its motives for having thus acted; it being understood, however, that the archives and documents relative to the affairs of the consulate shall be exempt from all search and shall be carefully preserved under the seals of the consuls, vice consuls, or commercial agents, and of the authority of the place where they may reside.
>
> "The consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews or of the captain should disturb the order or tranquility of the country, or the said consuls, vice consuls, or commercial agents should require their assistance to cause

their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country."

"Article XIV. The said consuls, vice consuls, or commercial agents are authorized to require the assistance of the local authorities for the arrest, detention, and imprisonment of the deserters from the ships of war and merchant vessels of their country; and for this purpose they shall apply to the competent tribunals, judges, and officers, and shall in writing demand said deserters, proving, by the exhibition of the registers of the vessels, the rolls of the crews, or by other official documents, that such individuals formed part of the crews, and on this reclamation being thus substantiated, the surrender shall not be refused.

"Such deserters, when arrested, shall be placed at the disposal of the said consuls, vice consuls, or commercial agents, and may be confined in the public prisons, at the request and cost of those who claim them, in order to be sent to the vessels to which they belonged or to others of the same country. But if not sent back within the space of two months, reckoning from the day of their arrest, they shall be set at liberty and shall not be again arrested for the same cause.

"It is understood, however, that if the deserter should be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending shall have pronounced its sentence and such sentence shall have been carried into effect."

Treaties and Other International Acts of the United States of America, by Miller, Vol. 3, pp. 292, 294.

STATEMENT OF THE CASE

The essential, undisputed facts of this controversy are as follows:

Peter Van der Weyde, the petitioner, being a subject of the Netherlands, during 1922 in Oregon signed Norwegian articles of employment for a trans-Pacific voyage as a member of the crew of the Norwegian steamship "Luise Nielsen," therein expressly agreeing that his rights and obligations during employment be governed by the Norwegian law, and that any dispute be decided by the Norwegian Consul, and not by any foreign court in a foreign country.

Shortly after the termination of said voyage, on September 15, 1922, admiralty libel *in rem* against said vessel was filed in the District Court for Oregon by petitioner, who sought recovery of damages for personal injuries, claimed to have been suffered aboard in May, 1922, while on the high seas in the course of said voyage, returning from the Orient, six days before arrival at destination, as the result of unwholesome food and as the result of a fall through an open, unguarded, unlighted hatch. Such libel, after intervention and protest by the Norwegian Consul, resident at Portland, and after issues joined and testimony taken, was dismissed by the District Court for Oregon in May, 1924.

Also shortly after the termination of said voyage said Norwegian Consul, in recognition of his official duties, promptly attended petitioner in connection with such personal injuries and caused approximately $2000 to be expended in his behalf for hospitalization and other necessities, at the expense of the Norwegian steamship owner and the Norwegian government.

On April 18, 1931, in the District Court for Washington, petitioner instituted this cause, by filing similar admiralty libel *in rem* against the same vessel, seeking recovery of damages for the same personal injuries, and alleging the same cause of action.

Prior to said libel in this cause, title to said vessel was transferred by B. Stolt Nielsen & Co., Inc., the Norwegian owner, to the Ocean Transport Company, Ltd., a Japanese corporation, under bill of sale containing warranty that said vessel was "free from all debts and encumbrances"; and incident to such sale said vessel was renamed the "Taigen Maru."

In this cause, after intervention and protest of the Norwegian Consul resident at Seattle, the District Court for Washington dismissed the libel, ruling that, under all circumstances, in the exercise of its discretion jurisdiction should not be maintained for a hearing upon the merits. Later the Circuit Court of Appeals affirmed the dismissal upon the ground, first

urged on appeal, that jurisdiction was wholly non-existent because of Article XIII of the Treaty of 1827—concluding it "unnecessary to consider other points argued in the briefs."

ARGUMENT

Upon the background reflected by the foregoing summary, this court has required discussion of the jurisdiction of the District Court sitting in admiralty over this controversy, as affected by the Treaty of 1827.

The petition initiating this review contains implied admission that as long as this treaty remained effective it clothed Norwegian consuls with sole jurisdiction sufficiently broad to include a dispute like the present. The petition (p. 6) puts the query, "whether or not the provisions of this treaty have not been abrogated by the adoption of the Seaman's Act." It inferentially assumes that, while continuing in force, the treaty was operative to confine jurisdiction in this general class of cases to the foreign consular officials.

Likewise the typewritten brief (pp. 15, 17) in support of the petition, asserts the contention of abrogation of the treaty by the Seaman's Act of 1915, in

an atmosphere of like tacit concession, without suggestion that the terms of the treaty were no comprehensive enough to cover a claim of this character.

Such a premise in entering a consideration of the jurisdictional question seems justified by the plain language of Article XIII of the Treaty of 1827, by similar provisions of Article V in the prior Treaty of 1816 with the Kingdom of Sweden and Norway, by comparable terms (*) in treaties with other nations, by the resultant practices, and, lastly, by decisions of the admiralty courts of this country.

Foreign consular jurisdiction, when vested by treaty, was recognized by this court in an opinion saying:

> "Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed."
>
> *The Belgenland*, 114 U. S. 355, 364; 29 L. Ed. 152, 155.

(*) See: Wildenhus' case, 120 U. S. 1; 30 L. Ed. 567, 568. Also see: Austria-Hungary 1848, Article IV; Austria-Hungary 1870, Article XI; Belgium 1880, Article XI; Colombia 1850, Article III, subd. 8; Denmark 1861, Article I; France 1853, Article VIII; Germany 1871, Article XII; Greece 1901, Article XII; Italy 1878, Article XIII; Italy 1881; Netherlands 1878, Article XI.

Later this court, in a criminal case, when considering treaty provisions similar to Article XIII of the Treaty of 1827, approved exclusive jurisdiction of foreign consults as to civil matters in the following language:

> "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquility of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority. Such being the general public law on this subject, treaties and conventions have been entered into by nations having commercial intercourse, the purpose of which was to settle and define the rights and duties of the contracting parties with respect to each other in these particulars, and thus prevent the inconvenience that might arise from attempts to exercise conflicting jurisdictions." * * *

"The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction."

Wildenhus' case, 120 U. S. 1; 30 L. Ed. 565, 567, 569.

More recently the same doctrine has been repeated.

"In the absence of treaty stipulation, the courts of admiralty of the United States have jurisdiction of all matters appertaining to a foreign ship while in the ports of this country. (Citations.)"

Heredia v. Davies, 12 Fed. (2d) 500, 501. (C. C. A. 4).

In the case of *The Rindjani*, 254 Fed. 913 (C. C. A. 9), it was squarely held that the admiralty courts of this country had no jurisdiction of a libel by a Dutch seaman to recover the cost of return transportation, under shipping articles signed with a Dutch vessel, because of the exclusive consular jurisdiction granted by Article XI of the Treaty of 1878 with the Netherlands.

In denying a wage claim to a Prussian seaman against a vessel of the same nationality, the Circuit Court gave effect to the Prussian Treaty of 1828

granting sole consular jurisdiction, with the conclusion:

> "But I am constrained to the conclusion, that the treaty required that this matter in difference should have been left where, I think, the treaty with Prussia leaves it—in the hands, and subject to the determination, of their own public officer. The necessary result is the dismissal of the libels."
>
> *The Elwine Kreplin*, Fed. Cas. 4426 (C. C.).

In the decisions of the lower federal courts the same principle has been declared.

The Treaty of 1871 with Germany was held to confer like consular judicial powers, by an opinion which said:

> "For this court to undertake to settle the dispute between the parties, and to determine the question of libelants' right to their discharge under the contract, and hence of their right to wages, would require a consideration and construction of the contract by the court, which, under the treaty, the court has not the jurisdiction to do. And while I may be of opinion, as I construe the shipping articles produced, that under them libelants are entitled to be discharged at this port, still the court has, as I have said, no jurisdiction so to adjudicate, but must remit the matter to the consul. *The Elwine Kreplin*, 9 Blatchf. 439. It is therefore ordered that the libel be dismissed."
>
> *The Buchard*, 42 Fed. 608 (D. C.).

Article XIII of the Norwegian Treaty of 1827 was determined to withhold jurisdiction from the admiralty courts with respect to a claim against a Norwegian vessel by an alien seaman signing articles in an American port, the opinion containing the following language:

> "This is the very case provided for in the treaty, of which the consul is thereby made the 'judge and arbitrator'; and this court, being a local authority, is prohibited from interfering with him. But it is contended that the treaty does not apply to an American citizen shipped at an American port on a Norwegian vessel, and, assuming that the libelant is such citizen, the consul has no jurisdiction and this court has."
>
> * * *
>
> "The treaty of 1827 is a law of that kingdom, and by it the consuls of that country are given exclusive jurisdiction of all 'differences'—controversies—between the captain and crew of a Norwegian vessel. This, in effect, forbids—disables—the libelant from resorting to any other tribunal for the settlement of such 'difference.' The treaty is also a law of the United States, and forbids this court from interfering in a case of a 'difference' between the master and crew of a Norwegian vessel."
>
> *The Marie*, 49 Fed. 286, 288.

The Treaty of 1827 was again invoked with the same result as to the libel of a citizen of the United States, signing articles on a Norwegian vessel in an American port, who demanded damages for being put

ashore in manacles. The protest of the Norwegian Consul was granted against jurisdiction of the admiralty court, by an opinion stating:

> "The earnest desire of this court to afford to seamen every right and protection authorized by the law, and the sympathy I have with that class of people to which libelant belongs, strengthened by the able and impressive argument of his counsel, induced me to take for examination and careful consideration the matter and argument submitted, before a decision by the court denying the jurisdiction prayed for; but the consideration has only served to confirm the correctness of the decision of this court in the case of *The Burchard*, 42 Fed. Rep. 608, where it was held that one court had no jurisdiction in a case very similar to this one. In addition to that case, I cite, as sustaining the decision in this, *The Salomoni*, 29 Fed. Rep. 534; *The Marie*, 49 Fed. Rep. 286; *The Elwine Kreplin*, 9 Blatchf. 438; *In re Ross*, 140 U. S. 453, 11 Sup. Ct. Rep. 897."

The Welhaven, 55 Fed. 80, 81.

In a case involving the Treaty with Germany of 1871, upon a claim by a German seaman against a German vessel the court's opinion uses the following language:

> "A fair and faithful observance of the treaty stipulations would plainly forbid such interference by a German court, and equally forbids this court to take jurisdiction of the present case."

The Bound Brook, 146 Fed. 160, 165 (D. C.).

Once more the same Treaty of 1827 was reviewed with equal effect upon a libel by a German seaman against a Swedish vessel for personal injuries suffered in an American port. In concluding that Article XIII deprived the federal court of judicial authority, the opinion is too extended for full quotation, but in small part it said:

> "Where treaty stipulations exist, however, with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land, and must be fairly and faithfully observed."
>
> *The Ester*, 190 Fed. 216, 221.

Of much more recent date is the ruling in a case involving a suit by a German seaman against a Greek vessel, where the treaty provision was similar to that of the Norwegian Treaty of 1827. The court's expression was as follows:

> "The exclusion of the jurisdiction of the court, under the language of the Convention, provides that the consular officer of respective nations shall alone take cognizance over differences between the captains, officers and crew, particularly in reference to the adjustment of wages, and no distinction is made between Greek seamen and other seamen upon Greek vessels. The want of jurisdiction is not subject to the discretion of the court on the ground that the libelant is a German not a Greek seaman."
>
> *The Cambitsis*, 14 Fed. (2d) 236, 237.

In further considering "the application to this controversy of the Treaty of Commerce & Navigation of July 4, 1827", discussion is appropriately directed to the time and manner of effective termination, abrogation or modification of Article XIII.

The status of a treaty in the jurisprudence of this country is determined by the Constitution in Article VI, which says in part:

> "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. * * *"

In construing this provision this court has held that statutes of Congress and treaties of this nation are on a parity.

Cherokee Tobacco v. U. S., 11 Wall 616, 20 L. Ed. 227;

Thomas v. Gay, 169 U. S. 264, 42 L. Ed. 740;

Rainey v. U. S., 232 U. S. 310, 58 L. Ed. 617.

In the first of these cases the opinion uses the following expression:

> "A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty."

Cherokee Tobacco v. U. S., 11 Wall 616, 619, 20 L. Ed. 227, 229.

Treaties, like statutes, may be superseded by subsequent provisions of express annulment or of necessary unavoidable inconsistency. But under principles of construction and in deference to international obligations recognized by this court, it refuses to adjudge a treaty vitiated by a later statute of Congress unless the will and the expression of the sovereign are clear. Reflecting such attitude, this court has said:

> "* * * it is the duty of the courts not to construe an Act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction. (Citations.)"
>
> *Lem Moon-Sing v. U. S.*, 158 U. S. 538, 549, 39 L. Ed. 1082, 1086.

Elsewhere the same doctrine has been expressed.

> *Karnuth v. U. S.*, 279 U. S. 231, 235, 73 L. Ed. 677, 679;
>
> *Cook v. U. S.*, 288 U. S. 102, 120, 77 L. Ed. 641, 650.

Reaching the question of whether Article XIII of the Treaty of 1827 became inapplicable to this controversy by statutory supersession, petitioner's contentions are almost wholly tacit. The petition (p. 6) barely suggests the query of abrogation by the Seamen's Act of 1915. The brief (pp. 15, 17) in support of the petition merely asserts displacement of

the Treaty provisions by that statute without persuasive argument or substantiating authority.

However, in the absence of pointed disclosed attack upon the ruling of the Circuit Court of Appeals, under review, respondent broadly submits that the Seamen's Act of March 4, 1915, did not effectively supersede all of Article XIII of the Treaty of 1827; and contends that sufficient of the exclusive consular jurisdiction, granted therein, continued to withhold from the federal district courts like jurisdiction over this cause. Reasons:

1st: The Seamen's Act did not in explicit, express terms specifically direct the abrogation of Article XIII;

2nd: The Seaman's Act was not so necessarily and unavoidably inconsistent with all of the provisions of Article XIII as to require its entire abrogation;

3rd: The diplomatic negotiations by the State Department attempting to effect abrogation of the whole of Article XIII were in excess of Congressional direction and in violation of constitutional authority.

The Seaman's Act of 1915 (38 Stat. Ch. 153, p. 1164, sections 1 to 20) is too extended to permit of full quotation. However, careful reading substantiates the assertion that it did not particularize with

any numerical designation of Article XIII of the Treaty of 1827 as one condemned to elimination.

Whether one or more sections of the Seaman's Act were so necessarily and unavoidably inconsistent with Article XIII as to compel its entire abrogation requires some analysis of the provisions of the legislation and of the terms of that portion of the Treaty of 1827.

Article XIII of the treaty deals with consular agents, their appointment, rights, duties, immunities and their jurisdiction in general.

Article XIV deals with deserting seamen, their arrest and imprisonment by local authorities and special consular jurisdiction in connection therewith. In passing, to discard Art. XIV from intimate consideration, it is conceded that this portion of the Treaty was in terms inapplicable to this controversy, and was effectively annulled by unmistakable Congressional direction in Section 16 and Section 17 of the Seaman's Act, followed by State Department diplomatic correspondence in behalf of the President.

However, Article XIII, being in terms directly applicable to this cause, its scope invites examination.

Its first paragraph permits consular appointments, guarantees consular protection, promises local assist-

ance in their functions, allows prosecution of consular agents for violation of domestic laws, and yields immunity to consular archives against search or destruction. Was it the intention of the Seaman's Act of 1915 to abolish all consular representation as to Norway and a number of other nations having comparable articles in their existing treaties? Any reading of that statute resolves this question into a negation. Nevertheless, with no other authority than the Seaman's Act, the Secretary of State attempted to abrogate this first paragraph of Article XIII of the Treaty of 1827, and similar provisions of treaties with other countries. Such an assertion calls for verification, to be found in the closing official communication from the State Department to the Norwegian Minister, dated February 27, 1919, which finally concluded the negotiations by saying: "that Articles 13 and 14 of the Treaty of 1827 being in conflict with the provisions of the Act mentioned were terminated on July 1st 1916." (Foreign Relations of the United States, 1919, p. 53.)

Coming to a scrutiny of the second paragraph of Article XIII, it grants to consuls power to sit as judges and arbitrators, with jurisdiction in such differences as may arise between the captains and crews —without the interference of local authorities, in the

absence of disturbance to the order or tranquillity of the local country, unless required by such consuls to effect or support their decisions—saving to claimants appellate right to resort to the courts of their own nation. As already observed, the consular jurisdiction here conferred was general within the consular field of administration. The particular power and right to arrest and imprison deserting seamen and to enlist local authorities in assistance was separately granted in Article XIV. The consular tribunal derived its broad jurisdiction over visiting vessels and their internal affairs from Article XIII, permitting the consuls to settle differences concerning: wages paid or to be paid; hours of work and rest; duties and discipline; food, slop-chest and quarters; working conditions; fitness of men and seaworthiness of ship; employment, discharge and transportation; illness and injury; construction of the laws of the ship's flag and interpretation of customs and practices foreign to the local authorities.

This suggestive and inadequate listing of the subjects of probable dispute within the consular jurisdiction granted by Article XIII is sufficient to throw into marked contrast the narrower scope of any sections of the Seaman's Act of 1915, which, in terms, or by adjudication binding on this court, are operative as to foreign vessels and foreign crews.

The Seaman's Act abolished arrest and imprisonment of deserting seamen and withdrew cooperation of domestic authorities from foreign consuls by sections 16 and 17, thus necessitating the abrogation of Article XIV of the Treaty.

The Seaman's Act, through Section 4, also added to the foreign seamen's rights, the privilege of resort to our admiralty courts to demand half wages while they and their vessels were present in American ports.

Strathearn S. S. Co. v. Dillon, 252 U. S. 348, 64 L. Ed. 607;

Thompson v. Lucas, 252 U. S. 358, 64 L. Ed. 612.

The Seaman's Act, in Section 11, also protected foreign seamen from certain domestic abuses by prohibiting advances and restricting allotment of wages while in American ports.

Sandberg v. McDonald, 248 U. S. 184, 63 L. Ed. 200;

Jackson v. The Archimedes, 275 U. S. 463, 72 L. Ed. 374.

But as far as yet adjudged by this court most of the provisions of the Seaman's Act relate to American seamen. And likewise as far as yet declared by this court most of the consular jurisdiction conferred by Article XIII is remotely beyond the express provisions

of the Seaman's Act and equally far from any evident contemplation thereof.

> "It is true the act provides for the abrogation of inconsistent treaty provisions, but this provision has ample application treating the statute to mean what we have here held to be its proper construction. It abolishes the right of arrest for desertion. It gives to the civil courts of the United States jurisdiction over wage controversies arising within our jurisdiction. These considerations amply account for the treaty provision. See Treaties in Force, 1904 Ed. index, p. 969."
>
> *Sandberg v. McDonald*, 248 U. S. 184, 198, 63 L. Ed. 200, 204.

Judicial construction by this court limiting the modifying effect of the Seaman's Act upon Article XIII is in harmony with Congressional intent, as plainly disclosed in a view of that statute as a whole, and as particularly emphasized by the presence of Section 8 and Section 5 therein. These sections force the conclusion that Congress never intended to wipe out all consular jurisidiction.

Section 8 reaffirms limited consular power by amending Rev. Stat. Section 4600, for the purpose of eliminating the former duty of reclamation of deserting seamen. The provisions of Section 8 imply a background elsewhere of general consular jurisdiction because they prescribe a method of enforcing consular rulings as to insubordination.

Quite like Section 8 in nature, Section 5 infers the presence of general consular authority, and outlines procedure for dealing with claims of unseaworthiness of vessels.

Not only viewed from within the Seaman's Act itself, but also examined from without, the Congressional intent not to abolish consuls or terminate their jurisdiction (except as to the arrest and imprisonment of deserting seamen, as to demands for half wages in American ports, and as to prohibition against advances of wages in American ports) seems evident. In 1864 Congress enacted legislation (13 Stat. 121, Ch. 116, continued at present as 22 U. S. C. A. Sections 256, 257 and 258) insuring the faithful observance of consular treaties, establishing consular jurisidiction, and providing procedure in exercise thereof. Except for the elimination from Section 258 (formerly Rev. Stat. Section 4081) of power and duty as to arrest and imprisonment of deserting seamen by Section 17 of the Seaman's Act, this early legislation has continuously declared a Congressional purpose to preserve consular jurisdiction, which is entirely consistent with the retention thereof in Article XIII of the Treaty of 1827, and in other similar conventions.

In this surrounding of legislation in and out of the Seaman's Act of 1915, this court should not be reluc-

tant to reconcile its provisions with a continuation of consular jurisdiction in Article XIII, by maintaining its own interpretive point of view thus expressed:

"* * * Courts will always endeavor to construe them (statutes and treaties) so as to give effect to both."

Whitney v. Robertson, 124 U. S. 190, 194; 31 L. Ed. 386, 388.

"But the intention to abrogate or modify a treaty is not to be lightly imputed to Congress."

Pigeon, etc., Co. v. Cox, 291 U. S. 138, 160; 78 L. Ed. 695, 705.

"A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

Cook v. United States, 288 U. S. 102, 120; 77 L. Ed. 641, 650.

"But, even in the case of statutes, whose repeal or modification involves no question of good faith with the government or People of other countries, the rule is well settled that repeals by implication are not favored and are never admitted where the former can stand with the new Act. *Ex parte Yerger*, 8 Wall. 105 (75 U. S. XIX., 339). In *Wood v. U. S.*, 16 Pet. 362, Mr. Justice Story, speaking for the court upon a question of the repeal of a statute by implication, said: 'That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or

even all, of the cases provided for by it, for they may be merely affirmative or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.' In *State v. Stoll*, 17 Wall. 430 (84 U. S., XXI, 654), the language of the court was that 'It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.' See also *Ex parte Crow Dog*, 109 U. S. 570 (XXVII, 1035); *Arthur v. Homer*, 96 U. S. 140 (XXIV, 812); *Harford v. U. S.*, 8 Cranch, 109.

"When the Act of 1882 was passed, Congress was aware of the obligation this Government had recently assumed, by solemn Treaty, to accord to a certain class of Chinese laborers the privilege of going from and coming to this country at their pleasure. Did it intend, within less than a year after the ratification of the Treaty and without so declaring in unmistakable terms, to withdraw that privilege by the general words of the 1st and 2d sections of that Act? Did it intend to do what would be inconsistent with the inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed? These questions must receive a negative answer."

Chew Heong v. U. S., 120 U. S. 536, 549, 550; 28 L. Ed. 770, 773, 774.

" * * * and while the Allotment Act, being later, must control in case of conflict, it should be harmonized with the letter and spirit of the

treaty so far as that reasonably can be done, since an intention to alter, and, pro tanto, abrogate the treaty, is not to be lightly attributed to Congress. * * * It follows that if the Allotment Act is now construed to exclude such lands from allotment, a materially restrictive change will have been wrought in the terms of the treaty. Such a construction is to be avoided, if possible."

U. S. v. Payne, 264 U. S. 446, 449; 68 L. Ed. 782, 784.

"It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute."

"The same rules have been applied where the claim was that an act of Congress had abrogated some of the provisions of a prior treaty between the United States and China. Chew Heong v. United States, 112 U. S. 536, 550, 28 L. Ed. 770, 774, 5 Sup. Ct. Rep. 255. In that case it was held that the treaty could stand with the subsequent statutes, and, consequently, it was enforced.

"Like principles must control when the question is whether an act of Congress has been superceded in whole or in part by a subsequent treaty. A statute enacted by Congress expresses the will of the people of the United States in the most solemn form. If not repugnant to the Con-

stitution, it is made by that instrument a part of the supreme law of the land, and should never be held to be displaced by a treaty, subsequently concluded, unless it is impossible for both to stand together and be enforced. So far from there being any inconsistency between the statute and treaty here in question, the 12th section of the act of 1882, as amended in 1884, and continued in force for ten years from and after the passage of the act of 1892, is in absolute harmony with the treaty, and can be enforced without affecting or impairing any right secured by the treaty. On the contrary, the enforcement of that section as amended will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in the treaty of 1894. Despite the ingenious argument to the contrary, we do not perceive any difficulty whatever in reaching this conclusion, after carefully scrutinizing the treaty and the statute. A different conclusion would be hostile to the objects which, as avowed in the treaty, both the United States and China desired to accomplish. This is so clearly manifest that argument cannot, as we think, make it more so."

United States v. Lee Yen Tai, 185 U. S. 213, 222; 46 L. Ed. 878, 883.

"As stated by Chief Justice Marshall in Murray v. The Charming Betsy, 2 Cranch 64, 118, 2 L. Ed. 208, 228 * * * an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."

Cunard Steamship Co. v. Mellon, 262 U. S. 100, 132; 67 L. Ed. 894, 906.

"In reaching that conclusion the court seemed of opinion that if the statute were so construed

as to exclude the aliens, it would be in conflict with Article III of the Jay Treaty of 1794, 8 Stat. at L. 116, 117, a result, of course, to be avoided, if reasonably it can be done."

Karnuth v. U. S., 279 U. S. 231, 235; L. Ed. 677, 679.

The decisions of this court have not construed the Seaman's Act of 1915 as modifying Article XIII of the Treaty of 1827 to any greater degree than determined by the Circuit Court of Appeals in this cause, or contended by respondent.

Sandberg v. McDonald, 248 U. S. 184; 63 L. Ed. 200;

Neilson v. Rhine Shipping Co., 248 U. S. 205; 63 L. Ed. 208;

Strathearn Steamship Co. v. Dillon, 252 U. S. 348; 64 L. Ed. 607;

Thompson v. Lucas, 252 U. S. 358; 64 L. Ed. 612;

Jackson v. The Archimedes, 275 U. S. 463; 72 L. Ed. 374.

Since no decision embarrassing to this court stands in the path of approval to the Circuit Court of Appeals' ruling in this cause giving operative effect to Article XIII, discussion need continue only with respect to the interpretation of the Seaman's Act of 1915 in relation to the Treaty of 1827 as applied by the Secretary of State in diplomatic correspondence to execute the will of Congress. (Foreign Relations

of the United States: 1915, pp. 3-12; 1916, pp. 33-42; 1917, pp. 9-20; 1918, pp. 5-9; 1919, pp. 47-54.)

As already confessed, this correspondence culminated in an exchange of notes—the State Department asserting "that Articles XIII and XIV of the Treaty of 1827, being in conflict with the provisions of the act mentioned, were terminated on July 1, 1916"; and the Norwegian Minister asquiescing. (Foreign Relations of the United States, 1919, pp. 53-54.)

However, as abolishing the consular jurisdiction of Article XIII, operative as to this cause, it is contended that the diplomatic relations of the State Department were ineffective to terminate such jurisdiction and revest the same in the admiralty courts of this country, because such negotiations, resulting from a surprisingly loose and inexcusably inaccurate construction of the Seaman's Act, were far in excess of Congressional authority.

Reasons:

(1) The treaty power of the United States is vested in the President and the Senate;

(2) The limited jurisdiction of the district federal courts is derived solely from statutes;

(3) Executive departmental interpretation of its own authority under the constitution is not binding

upon this court any more than Congressional construction of its powers under the constitution.

By the investment of treaty-making power in the President, with the advice and consent of the Senate, through Article VI, Section 2 of the constitution, the Secretary of State was without authority to abrogate Article XIII in toto unless directed by the Seaman's Act. And no negotiations initiated or conducted by the Secretary of State with Norway could return to the federal district courts a portion of their jurisdiction, subject to contraction or expansion only by congressional legislation. In other words, if the action of the State Department (never ratified by the Senate) as to Article XIII was beyond the direction and intent of the Seaman's Act of 1915, such action was not only a misconstruction of that statute, but, in effect, an encrouchment upon constitutional segregation of powers by the executive upon the legislative branch of government—most cancerous when least conspicuous.

The diplomatic correspondence resulting from the passage of the Seaman's Act frequently reflected an understanding of theory of the State Department's limitation of authority, with no discrimination of practice in actual application of the Seaman's Act upon the Treaty of 1927.

In one communication the Secretary of State, on May 29, 1915, said:

> "The period of ninety days thus established will terminate on June first next, and it is therefore necessary that such notice be now given to the government to which you are accredited, in order that negotiations may be instituted looking to an agreement limiting the effect of the denunciation required by law to the operations of the treaty, or treaties, which are found to be in conflict with the provisions of the act. Inasmuch as treaties are contracts between governments, they can only be varied in whole or in part by mutual agreement or special consent. It is the hope, however, of the President that such an agreement can easily be reached which will leave unaffected all parts of the treaties with foreign governments not in consistent with the humanitarian and progressive provisions of the act. * * *
>
> "The President, although deeply anxious that an agreement be reached with foreign governments upon this subject, is not concerned as to the particular method by which it may be consummated, whether by signed protocols of conferences or by mutual exchange of note as is a common practice in the conduct of many diplomatic affairs of this character. The latter course seems preferable because more easily effected, in view of the constitutional requirements that formal agreements between the United States and other countries must be submitted to the Senate of the United States for its advice and consent. In this connection, however, you may point out to the Minister of Foreign Affairs that such reference to the Senate in the case of a mere exchange of notes will not be necessary, and that such an exchange of notes will be regular and effective because of the authority already granted

to the President by Section 16 of the act to abrogate portions of the treaties inconsistent therewith. Hence it will be perceived that the intent of Congress may be fully realized by informal agreements between the government of the United States and other powers, and that in this way the various important treaties now subsisting may remain in full force and effect with the exception of the articles relating to seamen," (*Foreign Relations of the U. S.*, 1915, pp. 6-9.)

Unfortunately for clarity of status as to Article XIII of the Norwegian Treaty of 1827, and like articles in other treaties subjected to attempted abrogation as a result of the Seamen's Act, in adopting the informal methods of diplomatic negotiation suggested by the Secretary of State the direction and intent of Congress was exceeded. The diplomatic correspondence between the Secretary of State and the representatives of numerous other countries attempted to modify treaty provisions not only related to the arrest and imprisonment of deserting seamen and the special jurisdiction of consuls concerning the demands for half wages in American ports and prohibitions against advances and limitations of allotments in American ports, but also attempted to wipe out entirely all jurisdicition of consular tribunals. Regrettably the complete record of diplomatic negotiations engendered by the Seaman's Act of 1915 is too voluminous for quotation here, necessitating merely

reference to source of research. (*Foreign Relations of the United States*: 1915, pp. 3-12; 1916, pp. 33-42; 1917, pp. 91-20; 1918, pp. 5-9; 1919, pp. 47-54.) In relation to the negotiations conducted between the State Department and the Kingdom of Norway, it is interesting to observe that while the Norwegian government did not object to the method of agreement proposed by the State Department, it did react favorably with evident reluctance in regard to the complete abrogation of all provisions in Article XIII.

On December 28, 1917, the Secretary of State addressed a letter to the Minister of Norway, indicating that the government of Norway had found itself unable to agree with proposals respecting the elimination of Articles XIII and XIV from the Treaty of 1927. (*Foreign Relations of the U. S.*, 1918, p. 6.)

On February 5, 1918, the Norwegian Minister of Foreign Affairs replied by communiciation indicating acquiescence as to the elimination of Article XIV, but saying:

> "With regard to the second of the two articles, namely Article XIII, I inquired in the note whether an arrangement conceived in the terms set forth therein (letter of October 29th) would be satisfactory to your government, while reserving to myself the right to revert to the two alternatives of the arrangement in question contained in your note of May last. * * * The Norwegian government has given proof of the ac-

commodating spirit it desires to show in this matter by the fact that the Norwegian legation in Washington, as stated to the American Secretary of State in a note verbale of December 11, 1916, has instructed the Norwegian consuls in the United States not to apply or invoke and treaty stipulations which are inconsistent with the above mentioned act of Congress as long as negotiations are pending in regard to a change in the treaty stipulations. I have the honor to request that you will kindly inform me whether the American government would be willing to explain the objection which it has to the Norwegian government's proposal of October 29th last, concerning Article XIII, as the Norwegian government was of the opinion that such an arrangement would give full assurance of the elimination of any inconsistency between the treaty and the act of Congress." (*Foreign Relations of the U. S.*, 1918, pp. 6-7.)

By communication to the American Minister in Norway, the Secretary of State replied to the Norwegian Minister of Foreign Affairs on May 31, 1918, quoting the Norwegian proposal of October 29th as follows:

"The stipulations contained in the second paragraph of Article XIII of the treaty relative to the right of Norwegian consuls in the United States of America to exercise exclusive jurisdiction without the intervention of the local authorities are subjected to the modification resulting from the fact that Norway has consented to this right being considered as abandoned to the extent that it would otherwise be in conflict with the provisions forming part of Section 4 of the act of Congress of March 4, 1915, entitled the

Seaman's Act. It is understood that the arrangement shall not imply the consent of the Norwegian government to the application to Norwegian vessels of Section 4 referred to." (*Foreign Relations of the U. S.*, 1918, P. 8.)

Sufficient of the correspondence has been quoted to reflect that the Norwegian government was extremly reluctant to yield abrogation of Article XIII. It did so only after he American State Department, without authority of Congressional act and without the advice and consent of the Senate, had issued a notice of denunciation of the entire Treaty of 1827 as a threat of coercion. The negotiation between the State Department and Norway; commenced in May, 1915, continued until culmination in April, 1919, with a nominal abrogation of all of Article XIII. (*Foreign Relations of the U. S.*, 1919, pp. 53, 54.)

In the correspondence between the State Department and Norway the latter attempted to avoid the abrogation of all of Article XIII, and in so doing made a suggestion of method which may have been impracticable, and might have resulted in international embarrassment. However, the reply of the State Department ment. However, the reply of the State Department was a mere indication of inability to restrict in any manner the operation of Article XIII, or to circumscribe within defined limits the consular jur-

isdiction, therein conferred, to exclude the possibility of its exercise in instances of inconsistency with the Seaman's Act of 1915. The State Department's only affirmative reaction to the Norwegian attempt to retain all portion of Article XIII consistent with the Seaman's Act was to make a serious gesture of the annulment of the entire treaty of 1827 by notice of denunciation. In treating with China the State Department was more liberal with concessions, since negotiations resulted in abrogation of only the second sentence of Article XVIII of the Treaty of 1858, as a result of Chinese request. (*Foreign Relations of the U. S.*, 1916, pp. 36-37). This conduct certainly was more in harmony with the restricted authority conferred upon the State Department by the Seaman's Act than its action in dealing with the Kingdom of Norway by threat of annulment as to the entire Treaty of 1827, which most certainly was not within the contemplation of Congress in passing the Seaman's Act of 1915.

If, as proposed by the Secretary of State in letter of May 29, 1915 (*Foreign Relations of the U. S.* 1915, pp. 6-9) informal notes were to be exchanged to execute the direction of the Seaman's Act, without the necessity of resort to the Senate for ratification, it would seem that the purpose might have been accomplished by adopting the simple expedient of delimit-

ing the consular jurisdiction prescribed by Article XIII by an agreement withdrawing from such jurisdiction prosecution of deserting seamen by arrest and imprisonment, demands of seamen for half wages in American ports and wage advancements and allotments to and by seamen in American ports. By such an expedient the Congressional instruction in the Seamen's Act to eliminate conflicting treaty provisions would have been executed and the Congressional authority would not have been exceeded. To such an expedient the Norwegian government would have been agreeable, judging by the official communications emanating from it to the State Department. By some such device the doubt and discussion in this and prior litigation might have been eliminated.

The sketchy, inadequate review of diplomatic correspondence between the State Department and the Norwegian government perhaps will serve no further than to invite careful scrutiny of the record of the negotiations. If made, it is submitted that such examination will substantiate respondent's contention that, in the main, the executive interpretation by the State Department of the unavoidable, necessary inconsistency between the Seaman's Act of 1915 and Article XIII is not embarrassing to a conclusion by this court thatt he practical application of such interpretation by the State Department upon Article

XIII was erroneous, unauthorized and ineffective. If this court is in accord with such a conclusion, it would seem to be relieved of obligation to give regard or weight to the State Department's attempted abrogation of all consular jurisdiction conferred by Article XIII.

> "That a power granted in the constitution to be exercised by a certain department of government and in a certain way, cannot be validly exercised by a treaty in disregard of the manner prescribed in the constitution."
>
> *Limitations on the Treaty-making Power* by Tucker, Sec. 373 III, pp. 427-8.

> "The action of no department of government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such." (Quotation from opinion of Justice McLean in *Turner v. American Baptist Missionary Union*, Fed. Cas. 14251).
>
> *Limitations on Treaty-making Power* by Tucker, p. 49.

> "On comparing the principles which govern and decide the necessary validity of a treaty with those on which its voluntary validity depends, we cannot but perceive that the former are of a judicial and that the latter are of a political nature. That diversity naturally leads to the opinion that the former are referable to the judiciary and the latter to those departments who are charged with the political interests of the states." (Quotation from opinion by Chief Justice Jay in *Jones v. Walker*, Fed. Cas. 7507.)
>
> *Limitations on Treaty-making Power* by Tucker, pp. 54, 55.

Presumably this court, in disregard of its own rulings, will not permit departmental interpretation of constitutional segregation and limitation of powers to supersede the constitutional requirements as to the formalities of consummating and terminating treaties.

> "For the obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import and of as unequivocal an authority."
>
> *The Amiable Isabella*, 6 Wheat. (U. S.) 1, 75, 5 L. Ed. 191, 209.

This court has held that under the guise of a departmental regulation or practice a statute, and inferentially a treaty, cannot be enlarged or restricted.

> "If Rule 7 is valid, the Secretary of the Interior has power to abridge and enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."
>
> *U. S. v. United Verde Copper Co*, 196 U. S. 207, 215; 49 L. Ed. 449, 452.

> "Administrative rulings cannot add to the terms of an act of Congress and make conduct criminal which such laws leave untouched. Waite v. Macy, 246 U. S. 606, 62 L. Ed. 892; U. S. v. George, 228 U. S. 14, 57 L. Ed. 712, 715; U. S. v. United Verde Copper Co., 196 U. S. 207, 215, 49 L. Ed. 449, 452."
>
> *U. S. v. Standard Brewery*, 251 U. S. 210, 220; 64 L. Ed. 229, 235.

This court has joined with inferior tribunals in giving some recognition to the general doctrine that courts would give weight to departmental or administrative interpretations relative to their duties. However, this court has likewise recognized exceptions to the doctrine.

> "It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such consruction will not be disturbed except for cogent reasons. (Citations.) But the court is not bound by a construction so established. (Citations.) The rule does not apply in cases where the construction is not doubtful."
>
> *U. S. v. Missouri P. R. Co.*, 278 U. S. 269, 280; 73 L. Ed. 322, 378.

Whatever complexities or doubts may have been engendered by the passage of the Seaman's Act of 1915, it would seem that there is so much clarity as to the limited extent of any necessary, unavoidable inconsistency between that act and the consular jurisdiction conferred by Article XIII as to leave this court unburdened by the weight of departmental interpretation.

In dealing with certain practices of the Interstate Commerce Commission, this court has said:

> "Long continued practice and the approval of administrative authorities may be persuasive in

> the interpretation of doubtful provisions of the statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed. A failure to enforce the law does not change it. The good faith of the carriers in the transactions of the past may be unquestioned, but that does not justify the continuance of the practice."
>
> *Louisville, etc., Co. v. U. S.*, 282 U. S. 740, 759; 75 L. Ed. 672, 684.

This court has recognized as effective exception to the general rule that interpretations and constructions of administrative and executive departments are entitled to weight, excluding the rule from operation where the courts are able to say that the intent of the controlling law is clear. Respondent submits, in harmony with contention urged to this court by Joseph H. Choate years ago, that the general rule is subject to an additional exception arising in the case of interpretation by executive or administrative departments of their own authority under the constitution. It would seem that if this court exercises the power of overruling Congressional interpretation of the powers of the legislative department of government by declaring statutes, which have received the vote of Congress and met with the approval of the President, to be unconstitutional, this court should not hesitate to disregard the ill-considered conclusions of the State Department, when culminated by

an attempted abrogation of Article XIII of the Treaty of 1827, to effect a counterfeit abolition of all consular officials and functions.

In mentioning the contentions previously made before this court by eminent counsel, reference was made to the case of *Ex parte Cooper*, 143 U. S. 472; 36 L. Ed. 232, where this court, faced with an interesting question not wholly dissimilar from the present, said:

> "We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or a treaty, and the case turns upon a question public in its nature which has not been determined by the political departments in the form of a law specifically settling it or by authorizing the executive to do so, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.' "
>
> *Ex parte Cooper*, 143 U. S. 472, 503; 36 L. Ed. 232, 242.

Turning to another point of possible attack by petitioner or query by this court, it may have been observed in the record that while petitioner suffered personal injuries in May, 1922, resulting in his alleged cause of action, libel was not filed in this cause until April 18, 1931. Apart from the abrogation of Article XIII, as asserted by petitioner, the Treaty of 1827 was effectively replaced by the Treaty with

the Kingdom of Norway signed June 5, 1928, and February 25, 1929, which was ratified by the Senate of the United States April 5, 1932. However, these dates do not make inapplicable to this controversy Article XIII of the Treaty of 1827, but rather confirm the application thereof.

By this court the doctrine has become established that as between governments treaties become operative from the date of their execution by the contracting nations, but as between individuals and as to individual rights vested before the treaty was ratified, the treaty is not considered concluded until ratified and proclaimed.

Davis v. Concordia, 9 How. (U. S.) 280; 13 L. Ed. 138;

U. S. v. Arredondo, 6 Pet. (U. S.) 691; 8 L. Ed. 457;

U. S. v. Sibbald, 10 Pet. (U. S.) 313; 9 L. Ed. 437;

Jecker v. Magee, 9 Wall. (U. S.) 32; 19 L. Ed. 571;

Dooley v. U. S., 182 U. S. 122; 45 L. Ed. 1074.

Another principle established by this court is that the abrogation of a treaty is operative only as to the future, leaving past transactions affecting individuals and their rights unmodified.

Head Money Cases, 112 U. S. 580; 28 L. Ed. 798.

By petitioner it has been intimated that because the respondent steamship "Luise Nielsen" was sold by her Norwegian owner and renamed the steamship "Taigen Maru" by her present Japanese owner, the Japanese claimant defending the libel in this cause is not entitled to the benefits of Article XIII of the Treaty of 1827, even conceding such benefits to have been available to the Norwegian owner.

Authority directly in point has not been uncovered, but on principle alone it would appear that the suggestion is unsound. This court is mindful of the nature of a maritime lien, which although actually non-existent, is the only legal right upon which petitioner claims a recovery against the respondent steamship in this cause. If petitioner ever became entitled to assert a maritime lien against the respondent steamship, that right accrued and petitioner's cause of action matured immediately upon his sustaining the personal injuries of which he complains. Petitioner's right to a maritime lien became an inherent, intangible part of the vessel itself, following her into all ports and through the hands of all owners. The record in this cause shows that the maritime lien being invisible, and the records thereof being unavailable, the present Japanese owner required of the former Norwegian owner protection in the contract of sale by way of warranty that the

vessel was "free from all debts and encumbrances." In recognition of the nature of the maritime lien and in appreciation of the effect of the warranty, the Norwegian consul at Seattle promptly intervened in the above entitled cause and protested the jurisdiction of the District Court for Washington (R. 14-19).

It is submitted that neither the petitioner nor the respondent steamship "Taigen Maru" is deprived of the rights nor freed of the obligations of the applicable laws of Norway, including the operative pertinent provisions of the Treaty of 1827.

As to another minor aspect of the limited question propounded by this court for review, petitioner has asserted that at the time of his injuries on the high seas on a return voyage from the Orient, the respondent steamship was under charter to the Asiatic American Steamship Company, an American concern, related to the vessel as owner *pro hac vice*. Like contention as to the relationship of the Asiatic American Steamship Company was made by petitioner in the litigation instituted by him in September, 1922, before the District Court of Oregon, as evidenced by the typewritten, unprinted portion of transcript of record in this cause on file with the clerk of the above entitled court, of which respondent has no copy, necessarily preventing specific reference to the facts

established in this regard. However, examination of the record made in the District Court for Oregon will show that the Norwegian owner of the respondent steamship denied that the Asiatic American Steamship Company was owner *pro hac vice*, the same denial being made by the Asiatic American Steamship Company itself when it was impleaded as respondent in *personam* by petitioner's amended libel. The record of the District Court of Oregon will also show that testimony and depositions were received by the District Court for Oregon and that thereafter libelant's petition was dismissed with costs taxed against petitioner, and in favor of the Norwegian owner and the Asiatic American Steamship Company.

Having in mind that at present this cause is before this court upon a question of jurisdiction raised in *limine*, it is submitted that on the bare assertion of petitioner that the Norwegian vessel was under demise charter to an American concern at the time petitioner's cause of action arose, which assertion was not made by affidavit until after oral ruling of the District Court for Oregon had been rendered, dismissing petitioner's libel, affording respondent no opportunity for denial, this court should concern itself solely with facts conceded in the record.

Finally, before concluding, it is appropriate that respondent especially direct the court's attention to

the history and the state of the record in this cause, in the event that after all the contentions of respondent have been considered the court should reject such contentions and should adjudicate Article XIII of the Treaty of 1827 to be inapplicable to this controversy. In that situation respondent submits that this cause should not be remanded to the District Court for Washington, but should be remanded to the Circuit Court of Appeals for the Ninth Circuit, with instructions to settle other jurisdictional defenses urged by respondent in that court, which as yet have not been decided in the lower appellate court because of its conclusion as to the applicability of the Treaty of 1827, and because, as stated in its opinion, it became "unnecessary to consider other points argued in the briefs of respondent.". (R. 46.)

Even though this court has denied respondent's motion to print the entire typewritten transcript of record in this cause on file with its clerk, there still remains in form for convenient reference in the affidavit supporting such motion to print the full record, and in the transcript of record which has been printed, sufficient to disclose the nature of the other jurisdictional defenses which have been advanced by respondent, and which respondent submits are sufficiently meritorious to be subjected to adjudication by the Circuit Court of Appeals for the Ninth Circuit.

Former opinions of this court in situations more or less closely analogous have created precedent for the return of this cause to the Circuit Court of Appeals. Certainly such precedents should be applicable since the writ of certiorari granted by this court has been "limited to the question of the application to this controversy of the Treaty of Commerce & Navigation of July 4, 1827." (R. 47.)

Lutcher & Moore Lbr. Co. v. Knight, 217 U. S. 257: 54 L. Ed. 757, 762;

Brown v. Fletcher, 237 U. S. 583, 588; 59 L. Ed, 1128, 1131;

Liberty Oil Co. v. Condon National Bank, 260 U. S. 235, 245; 67 L. Ed. 232, 237;

U. S. v. Brims, 272 U. S. 549, 555; 71 L. Ed. 403, 405.

CONCLUSION

Notwithstanding respondent's suggestion as to the final order of this court to meet the possibility of ruling adverse to respondent, on the whole record and all legal propositions considered, it is submitted that Article XIII of the Treaty of 1827 is applicable to the present controversy, and should be given recognition with resultant dismissal of petitioner's libel.

Respectfully submitted,

LANE SUMMERS,
Proctor for Respondent.

W. H. HAYDEN,
F. T. MERRITT,
G. H. BUCEY,
Of Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 4.—October Term, 1935.

Peter Van Der Weyde, Petitioner,
vs.
Ocean Transport Company, Ltd., a corporation, claimant of the Steamship "Taigen Maru", etc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 3, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner brought this libel in 1931, in the District Court for the Western District of Washington, against the vessel "Taigen Maru", for personal injuries which he sustained as a seaman in 1922. The vessel was then known as the "Luise Nielsen" and was of Norwegian registry. The respondent, Ocean Transport Company, Ltd., a Japanese corporation, made claim as owner, and filed exceptions alleging that a final decree had been entered in the District Court for the District of Oregon in 1924, dismissing a libel, for the same cause, on the intervention of the Norwegian consul.

In the present case, there was again an intervention by the Norwegian consul who claimed that, while the vessel was now Japanese, he was nevertheless officially concerned, as the former Norwegian owner had agreed to deliver the vessel "free from all debts and encumbrances". The consul filed exceptive allegations to the effect that the libelant, a Dutch subject, had signed Norwegian articles and, so far as his rights as a seaman were concerned, was bound by the laws of Norway, which provided for appropriate remedies. The consul asked that, if the cause was not dismissed because of the former decree, the dispute should be left for his adjustment and disposition. The libelant made response and, on hearing, the District Court dismissed the cause "in the exercise of its discretion".

The Circuit Court of Appeals affirmed the decree, but upon the ground that the dismissal should have been for want of jurisdic-

tion rather than as an exercise of discretion. 73 F. (2d) 922. The court based its decision upon the second paragraph of Article XIII of the Treaty of Commerce and Navigation, of 1827, between the United States and the Kingdom of Sweden and Norway, the text of which is given in the margin.[1] The court assumed that this provision was still in effect, apparently not being advised of the fact that Articles XIII and XIV of that treaty had been terminated in 1919. See Foreign Relations of the United States, 1919, pp. 47-54.

Section 16 of the Seamen's Act of March 4, 1915,[2] expressed "the judgment of Congress" that treaty provisions in conflict with the provisions of the Act "ought to be terminated", and the President was "requested and directed" to give notice to that effect to the several Governments concerned within ninety days after the passage of the Act. It appears that, in consequence, notice was given and that a large number of treaties were terminated in whole or in part.[3] The Treaty with Sweden and Norway of 1827 provided that it might be terminated, after an initial period of ten years, upon one year's notice.[4] On February 2, 1918, the Government gave notice to the Norwegian Government of the denunciation of the treaty in its entirety, to take effect on February 2, 1919, but later by an exchange of diplomatic notes, this Government formally withdrew its denunciation, except as to Articles XIII and XIV. Foreign Relations of the United States, 1919, pp. 50-52. It was expressly stated that Articles XIII and XIV of the treaty, being in conflict with provisions of the Seamen's Act, were deemed to be terminated on July 1, 1916, so far as the laws of the United States were concerned. *Id.*, pp. 53, 54.

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[1] 8 Stat. 346, 352. "Article XIII. . . . The consuls, vice consuls, or commercial agents, or the persons duly authorized to supply their places, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country; or the said consuls, vice consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood, that this species of judgment, or arbitration shall not deprive the contending parties of the right they have to resort, on their return, to the judicial authority of their country".

[2] 38 Stat. 1164, 1184.

[3] Foreign Relations of the United States, 1915, pp. 3 *et seq.*; 1916, pp. 33 *et seq.*; 1917, pp. 9 *et seq.*; 1918, pp. 3 *et seq.*; 1919, pp. 47 *et seq.*

[4] Article XIX, 8 Stat. 356.

On June 5, 1928, the two Governments signed a Treaty of Friendship, Commerce, and Consular Rights, and on February 25, 1929, an additional Article, which supplanted the Treaty of 1827 (so far as the latter had remained effective), save that Article I of the former treaty concerning the entry and residence of the nationals of the one country in the territories of the other for the purposes of trade, was continued in force.[5]

Respondent contends (1) that the Seamen's Act did not specifically direct the abrogation of Article XIII, (2) that the Act was not so unavoidably inconsistent with all the provisions of Article XIII as to require its entire abrogation, and (3) that the diplomatic negotiations attempting to effect abrogation of the whole of Article XIII "were in excess of congressional direction and in violation of constitutional authority".

The first and second points are unavailing, if Article XIII was actually abrogated in its entirety, and that this was the purport of the diplomatic exchanges between the two Governments is beyond dispute. As to the third point, we think that the question as to the authority of the Executive in the absence of congressional action, or of action by the treaty-making power, to denounce a treaty of the United States, is not here involved. In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the Act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to Articles XIII and XIV was arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it. Norway agreed to the termination of Articles XIII and XIV and her consul cannot be heard to question it.

The injuries, of which libelant complains, took place after that termination. The effect of the new treaty we need not, and do not, consider, as in any event it could not be regarded as retroactively affecting the jurisdiction of the District Court.

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[5] 47 Stat. Pt. 2, pp. 2135, 2158, 2159.

The Circuit Court of Appeals fell into error in sustaining the dismissal of the cause upon the ground of want of jurisdiction by reason of the treaty provision invoked. We express no opinion upon any other questions which the cause may present, as these have not been considered by the courts below. They should be considered and determined.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.